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Received FEB 1 1961

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 96

FROM APRIL 6, 1920, TO JULY 6, 1920

SAN FRANCISCO
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1921

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IN THE
STATE OF OREGON

July 6, 1920.

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Josephine } FRANK M. CALKINS, Medford.

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Benton }
Douglas } JAMES W. HAMILTON, Roseburg.

Curry }
Coos } JOHN S. COKE, Marshfield.

Lane }
Lincoln } GEORGE F. SKIPWORTH, Eugene.

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Marion } GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah..... }
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land.
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land.
JOHN MCCOURT, Department No. 6, Portland.
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Clackamas JAMES U. CAMPBELL, Oregon City.

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Umatilla } GILBERT W. PHELPS, Pendleton.

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Wasco } FRED W. WILSON, The Dalles.

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Baker GUSTAV ANDERSON, Baker.

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Harney		
Malheur		

Tenth Judicial District—

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Wallowa		

Eleventh Judicial District—

Gilliam	}	DAVID R. PARKER, Condon.
Sherman		
Wheeler		

Twelfth Judicial District—

Polk	}	HARRY H. BELT, Dallas.
Yamhill		

Thirteenth Judicial District—

Klamath DELMON V. KUYKENDALL, Klamath Falls.

Fourteenth Judicial District—

Lake J. M. BACHELDER, Lakeview.

Eighteenth Judicial District—

Crook	}	T. E. J. DUFFY, Bend.
Deschutes		
Jefferson		

Nineteenth Judicial District—

Tillamook	}	GEORGE R. BAGLEY, Hillsboro.
Washington		

Twentieth Judicial District—

Clatsop	}	JAMES A. EAKIN, Astoria.
Columbia		

DISTRICT ATTORNEYS

IN THE STATE OF OREGON

July 6, 1920.

County.	Name.	Official Address.
Baker.....	Levens, W. S.	Baker
Benton.....	Clarke, Arthur	Corvallis
Clackamas.....	Hedges, Gilbert L.	Oregon City
Clatsop.....	Barrett, Jasper J.	Astoria
Columbia.....	Metsker, Glen R.	St. Helens
Coos.....	Hall, John F.	Marshfield
Crook.....	Wirtz, Willard H.	Prineville
Curry.....	Buffington, Collier H.	Gold Beach
Deschutes.....	Moore, Arthur J.	Bend
Douglas.....	Neuner, George, Jr.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	J. M. Blank.....	Canyon City
Harney.....	Sizmore, George S.....	Burns
Hood River.....	Derby, A. J.	Hood River
Jackson.....	Roberts, G. M.	Medford
Jefferson.....	Boylan, Bert C.	Metolius
Josephine.....	Miller, W. T.	Grants Pass
Klamath.....	Duncan, William M.	Klamath Falls
Lake.....	McKinney, T. S.	Silver Lake
Lane.....	Ray, L. L.	Eugene
Lincoln.....	Geo. B. McCluskey.....	Toledo
Linn.....	Hill, Gale S.	Albany
Malheur.....	Swagler, R. W.	Malheur
Marion.....	Gehlhar, Max	Salem
Morrow.....	Notson, Samuel E.	Heppner
Multnomah.....	Evans, Walter H.	Portland
Polk.....	Piasecki, E. K.	Dallas
Sherman.....	Huddleston, C. M.	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Keator, R. I.	Pendleton
Union.....	Hodgin, John S.	La Grande
Wallowa.....	Fairchild, Abijah	Enterprise
Wasco.....	Galloway, Francis V.	The Dalles
Washington.....	Tongue, E. B.	Hillsboro
Wheeler.....	Trill, Wallace G.	Fossil
Yamhill.....	Conner, Roswell L.	McMinnville

TABLE OF CASES REPORTED.

In cases where municipalities are parties they are placed under the name of the city or county, and not under the letter "C."

A	PAGE
Allen v. Magill.....	610
Astoria v. Zindorf.....	332

B	
Baillie v. Columbia Gold Mining Co.....	32
Barzee, Herrick v.....	357
Beedle v. Stondall Land & Timber Co.....	590
Bilyeu v. Crouch.....	66
Blanchard, State v.....	79
Blaser v. Fleck.....	187
Brown v. McCloud.....	549
Burr v. Mutual Life Ins. Co.....	14
Butler, State v.....	219

C	
Campbell v. Coin Mach. Mfg. Co.....	119
Central Pac. Ry. Co. v. Gage, Sheriff.....	192
Chance v. Weston.....	390
Chase v. La Moree.....	28
Clatsop County v. Fidelity & Deposit Co. of Maryland.....	2
Clatsop County v. Wuopio.....	1
Coates v. Marion County.....	334
Coffey v. Northwestern Hospital Assn.....	100
Coin Mach. Mfg. Co., Campbell v.....	119
Cole v. Portland.....	645
Columbia Gold Mining Co., Baillie v.....	32
Conley, Miller v.....	413
Crouch, Bilyeu v.....	66

E	
Ebbe, Neis v.....	151
Elgin Warehouse Co., Horn v.....	403
Elmira Lumber Co. v. Owen.....	127
Endicott, Johnson & Co. v. Multnomah County.....	679

F	
Fidelity & Deposit Co. of Maryland, Clatsop County v.....	2
First National Bank v. Yocum.....	438
Fleck, Blaser v.....	187
Foskett, Howard v.....	446

TABLE OF CASES REPORTED.**ix**

G	PAGE
Gage, Sheriff, Central Pac. Ry. Co. v.....	192
Gauld Co., Martin, v.....	635
Gearin v. Rothchild Bros.....	351
Giles v. Roseburg	453
Gross, Slattery v.....	554
 H	
Hammond Lumber Co. v. Public Service Commission.....	595
Hartman v. Pendleton.....	503
Herrick v. Barzee.....	357
Hill, Hurst v.....	311
Hill, Medford Irr. Dist. v.....	649
Holmes v. Olcott, Secretary of State.....	33
Horn v. Elgin Warehouse Co.....	403
Howard v. Foskett.....	446
Hueners, McFarland v.....	579
Hurst v. Hill.....	311
 I	
In re McIlroy.....	468
 J	
James v. Ward.....	667
Jensen, Whetstone v.....	576
Johnson, Tillamook County v.....	623
Jones v. Jones.....	197
 K	
Kotchik, Shevchuk v.....	181
 L	
La Moree, Chase v.....	28
Lesser v. Palley.....	142
 Mo	
McCloud, Brown v.....	549
McCoy, W. T. Rawleigh Co. v.....	474
McDonald v. Supple.....	486
McFarland v. Hueners.....	579
McIlroy v. McIlroy.....	468
 M	
Magill, Allen v.....	610
Marion County, Coates v.....	334
Martin v. Gauld Co.....	635
Medford Irr. Dist. v. Hill.....	649
Miller v. Conley.....	413
Moore v. Moore.....	134
Multnomah County, Endicott, Johnson & Co. v.....	679
Murphy v. Whetstone.....	294
Mutual Life Ins. Co., Burr v.....	14

TABLE OF CASES REPORTED.

N	PAGE
Nault v. Palmer.....	538
Neis v. Ebbe.....	151
New England Casualty Co., Portland v.....	48
Northwestern Hospital Assn., Coffey v.....	100
Noyes-Holland Logging Co. v. Pacific Livestock Co.....	567

O	
O'Day v. Spencer.....	73
Olcott, Secretary of State, Holmes v.....	33
Owen, Elmira Lumber Co. v.....	127

P	
Pacific Livestock Co., Noyes-Holland Logging Co. v.....	567
Pacific Livestock Co. v. Portland Lumber Co.....	567
Palley, Lesser v.....	142
Palmer, Nault v.....	538
Parkey, State v.....	499
Pendleton, Hartman v.....	503
Pioneer Show & Com. Printing Co. v. Zetosh.....	194
Portland, Cole v.....	645
Portland Lumber Co., Pacific Livestock Co. v.....	567
Portland v. New England Casualty Co.....	48
Portland, Star Sand Co. v.....	323
Public Service Commission, Hammond Lumber Co. v.....	595

R	
Rawleigh Co., W. T., v. McCoy.....	474
Roseburg, Giles v.....	453
Rothchild Bros., Gearin v.....	351
Russell v. Smith.....	629

S	
Savage, State v.....	53
Schnitzer v. Stein.....	343
School Dist. No. 1, Taggart v.....	422
Seuffert Bros. Co., Williams v.....	163
Shevchuk v. Kotchik.....	181
Slattery v. Gross.....	554
Smith, Russell v.....	629
Spencer, O'Day v.....	73
Star Sand Co. v. Portland.....	323
State Board of Dental Examiners, State ex rel. v.....	529
State v. Blanchard.....	79
State v. Butler.....	219
State v. Parkey.....	499
State v. Savage.....	53
State ex rel. v. State Board of Dental Examiners.....	529
Steele v. Steele.....	630
Stein, Schnitzer v.....	343
Stondall Land & Timber Co., Beedle v.....	590
Supple, McDonald v.....	486

TABLE OF CASES REPORTED.**xi**

T	PAGE
Taggart v. School Dist. No. 1.....	422
Tillamook County v. Johnson.....	623

W	
Ward, James v.....	667
Weston, Chance v.....	390
Whetstone v. Jensen.....	576
Whetstone, Murphy v.....	294
Williams v. Seuffert Bros. Co.....	163
W. T. Rawleigh Co. v. McCoy.....	474
Wuopio, Clatsop County v.....	1

Y	
Yocum, First National Bank v.....	438

Z	
Zetosh, Pioneer Show & Com. Printing Co. v.	194
Zindorf, Astoria v.....	332

TABLE OF CASES CITED.

A	PAGE
Aaron v. Ward, 203 N. Y. 351.....	117
Abbott v. Sanders, 80 Vt. 179.....	307
Acers v. United States, 164 U. S. 388.....	246
Adams v. Brosius, 69 Or. 513.....	115
Advance Thresher Co. v. Ested, 41 Or. 469.....	186
Allen v. Allen, 58 Wis. 202.....	417
American Contract Co. v. Bullen Bridge Co., 29 Or. 549.....	496
American Mortgage Co. v. Hutchinson, 19 Or. 334.....	847
American Surety Co. v. Lawrenceville Cement Co., 110 Fed. (C. C.) 717.....	10
Annis v. Wilson, 15 Colo. 236.....	396
Arlin v. Brown, 44 N. H. 102.....	306
Arms v. Ayer, 192 Ill. 601.....	63
Ascue v. C. Aultman & Co., 2 Tex. App. (Civ. Cas.) 441.....	443
Austro-American S. S. Co. v. Thomas, 248 Fed. 231.....	117

B	PAGE
Baillie v. Columbia Gold Mining Co., 86 Or. 1.....	32
Baillie v. Columbia Gold Mining Co., 95 Or. 609.....	33
Baker City Mercantile Co. v. Idaho Cement Pipe Co., 67 Or. 372	8
Baldwin v. Grand Trunk Ry. Co., Sup. Ct. N. H., July, 1888, in dis. opn.....	283
Ball v. Hatsell, 161 U. S. 72.....	370
Barbier v. Connolly, 113 U. S. 27.....	58
Barr v. Rader, 33 Or. 376.....	371
Barton v. School Dist. No. 2, 77 Or. 30.....	430
Bears v. Grand Rapids, 129 Mich. 572.....	691
Beam v. United States, 162 Fed. 260.....	399
Beckett v. City of Portland, 53 Or. 169.....	464
Belknap v. Charlton, 25 Or. 41.....	172
Bernard v. Kellogg, 10 Wall. (U. S.) 388.....	411
Bermudez v. Critchfield, 62 Ill. App. 221.....	386
Berry v. State, 10 Ga. 511, in dis. opn.....	282
Bileu v. Paisley, 18 Or. 47.....	553
Blackstone v. Miller, 188 U. S. 189.....	685
Blundell v. Brettargh, 17 Ves. Jr. 231.....	146
Board of Assessors v. Comptoir National, 191 U. S. 388...684,	687
Board v. Tregea, 88 Cal. 357.....	663
Boone v. State, 170 Ala. 57.....	59
Booth v. Moody, 30 Or. 222.....	51
Bowen v. Clarke, 22 Or. 566.....	342
Boyce's Exrs. v. Grundy, 28 U. S. (3 Pet.) 210, in dis. opn.....	22
Branson v. Oregonian Ry. Co., 10 Or. 278.....	124
Brawley v. Catron, 8 Leigh (Va.), 522.....	306

TABLE OF CASES CITED.

xiii

	PAGE
Bremmer v. Green Bay etc. R. R. Co., 61 Wis. 114, in dis. opn..	283
Bretz v. Mayor etc., 6 Rob. (N. Y.) 325.....	96
Bridenstine v. Gerlinger Motor Car Co., 86 Or. 411.....	318
Britton v. Thornton, 112 U. S. 526.....	71
Brogan v. National Surety Co., 246 U. S. 257.....	7, 8
Brow v. State, 103 Ind. 133, in dis. opn.	283
Brown v. Brown, 34 Barb. (N. Y.) 533.....	363
Brown v. Oregon Lumber Co., 24 Or. 317.....	371
Brownell v. People, 38 Mich. 732.....	244
Brown v. Swineford, 44 Wis. 282, in dis. opn.....	283
Bryant v. State (Tex. Cr. App.), 47 S. W. 373.....	259
Bullard v. Boston & Maine R. R. Co., 64 N. H. 27, in dis. opn....	283
Bullis v. Drake, 20 Neb. 167, in dis. opn.	283
Burnham v. Webster, 5 Mass. 266.....	95
Burroughs v. Burroughs, 164 Ala. 329.....	308
Burrows v. Balfour, 39 Or. 488.....	554

C

Caldwell v. Duncan, 87 S. C. 331.....	238
Callender Navigation Co. v. Pomeroy, 61 Or. 343.....	684
Carnahan Manufacturing Co. v. Beebe-Bowles Co., 80 Or. 124...	331
Carney v. Barrett, 4 Or. 171.....	346
Catlin v. Jones, 52 Or. 337.....	321
Catlin v. Lyman, 16 Vt. 44.....	528
Cavniess v. La Grande Irr. Co., 60 Or. 410.....	619
Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Iowa, 426....	605
Chase v. City of Chicago, 20 Ill. 274, in dis. opn.....	282
Chesebrough v. Conover, 140 N. Y. 382.....	362
Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559.....	61
Chicago & N. W. Ry. Co. v. Railroad Commission, 156 Wis. 47.	608
Chicago etc. R. R. Co. v. Brogonier, 13 Ill. App. 467, in dis. opn.	282
Chouteau v. Dean, 7 Mo. App. 210.....	124
Christie v. Scott, 77 Kan. 257.....	443
City of Augusta v. Kimball, 91 Me. 605.....	684
City etc. Trust Co. v. United States, 147 Fed. 155.....	10
City of Pendleton v. Jeffery & Bufton, 95 Or. 447.....	9
City of Portland v. Schmidt, 13 Or. 17.....	61
City Trust, Safe Deposit & Surety Co. v. United States to Use of Bryant, 147 Fed. 155.....	10
Clarke v. Ludlam, 7 Bing. 279.....	506
Clark v. State, 23 Tex. App. 260, in dis. opn.....	283
Clatsop County v. Fidelity & Deposit Co. of Maryland, 96 Or. 2.	50
Clatsop County v. Wuopio, 89 Or. 713.....	2
Clay v. Clay, 56 Or. 538.....	33
Clayton v. Berry, 27 Ark. 129.....	38
Cleveland Paper Co. v. Banks, 15 Neb. 20, in dis. opn.....	283
Clippenger v. Hepbaugh, 5 Watts & S. (Pa.) 315, in dis. opn.....	377, 378, 386
Cloud v. Sledge, 1 Bail. (S. C.) 105.....	148
Cohen v. New York Mutual Life Ins. Co., 50 N. Y. 610, in dis. opn.....	21, 25
Cohn v. Wemme, 47 Or. 146.....	150
Coit v. Claw, 28 Ark. 516.....	193

	PAGE
Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487.....	365
Colgan v. Farmers' etc. Bank, 59 Or. 469.....	124
Columbia County v. Consolidated Const. Co., 83 Or. 251.....	7
Combs v. State, 75 Ind. 215, in dis. opn.....	283
Commonwealth v. McCurdy, 5 Mass. 324.....	95
Commonwealth v. Selfridge (Selfridge Trial, Mass.).....	160, 243
Conklin v. La Dow, 33 Or. 354.....	319
Conneau v. Geis, 73 Cal. 176.....	347
Conn. v. State, 11 Tex. App. 390, in dis. opn.....	283
Cooper v. Thomason, 30 Or. 161.....	396, 451
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79.....	58
County of Olmsted v. Barber, 31 Minn. 256.....	193
Coyote G. & S. M. Co. v. Ruble, 9 Or. 121.....	346
Crawford v. Wist, 26 Or. 596.....	584
Cross v. State, 68 Ala. 476, in dis. opn.....	282
Cullen v. Glendora Water Co., 113 Cal. 503.....	663
Curtis v. Hoyt, 19 Conn. 154.....	510
Curtis v. State (Tex. Cr. App.), 59 S. W. 263.....	259

D

Dallinger v. Rapello (C. C.), 14 Fed. 32.....	691
D'Arcy v. Sanford, 81 Or. 323.....	587
Darnell v. Edwards, 244 U. S. 564.....	609
Davis v. Commonwealth, 164 Mass. 241.....	362
Davis v. First Nat. Bank of Albany, 86 Or. 474.....	561, 587
Day v. Connecticut Gen. L. Ins. Co., 45 Conn. 480, in dis. opn..	21
Deardorff v. Idaho Nat. Harvester Co., 90 Or. 426.....	688
Dederick v. Wolfe, 68 Miss. 500.....	443
Demott v. Jones, 2 Wall. (U. S.) 1.....	497
Denton v. McDonald, 104 Tex. 206.....	546
Devlin v. Moore, 64 Or. 433.....	138, 190
Devlin v. Moore, 64 Or. 464.....	138
De Vol v. Citizens' Bank, 92 Or. 606.....	395
Dickenson v. Henderson, 90 Or. 408.....	471
Dickerson v. Burke, 25 Ga. 225, in dis. opn.....	282
Doran v. Doran, 99 Cal. 311.....	395
Duvall v. Perkins, 77 Md. 582.....	193
Doughty v. Conover, 42 N. J. Law, 193.....	93
Durkee v. Carr, 38 Or. 189.....	331
Dugan v. Gittings, 3 Gill (Md.), 138.....	398

E

Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1.....	60
Elder v. Rourke, 27 Or. 363.....	493
Ely v. New Mexico etc. Ry. Co., 129 U. S. 291.....	616
Evans v. State, 120 Ala. 269.....	259

F

Fairchild v. Rasdall, 9 Wis. 379.....	451
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.....	657
Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111.....	617
Farnum v. Loomis, 2 Or. 29.....	399
Felix v. Scharnweber, 119 Ill. 445, in dis. opn.....	282

TABLE OF CASES CITED.

XV.

	PAGE
Ferguson v. State, 49 Ind. 33, in dis. opn.....	283
Fitch v. Howitt, 32 Or. 396.....	53
Flecten v. Lamberton, 69 Minn. 187.....	47
Foreman v. School Dist. No. 25, 81 Or. 587.....	430
Fouts v. Hood River, 46 Or. 492.....	63
Francis v. Bohart, 76 Or. 1.....	442
Francis v. Mutual Life Ins. Co., 61 Or. 141.....	346
French v. Cresswell, 13 Or. 418.....	553
Fry v. Bennett, 3 Bosw. (N. Y.) 200, in dis. opn.....	283
Fudickar v. East Riverside Irr. Dist., 109 Cal. 29.....	617

G

Galveston etc. R. R. Co. v. Cooper, 70 Tex. 67, in dis. opn.....	283
Galveston etc. R. R. Co. v. Rubio (Tex. Civ. App.), 65 S. W. 1126.	117
Galvin v. Brown & McCabe, 53 Or. 598.....	340
Gard v. Peck, 91 Or. 33.....	657
Garnsey v. County Court, 33 Or. 201.....	649
Gibson v. Zeibig, 24 Mo. App. 65, in dis. opn.....	283
Gildner v. Hall (D. C.), 227 Fed. 704.....	162
Gilmer v. Stone, 120 U. S. 586.....	507
Goldgart v. People, 106 Ill. 25.....	688
Goodwin v. Tuttle, 70 Or. 424.....	620
Gormley v. Clark, 134 U. S. 338, in dis. opn.....	22
Grand Rapids etc. Ry. Co. v. Michigan Railroad Com., 188 Mich. 108.....	603
Gray v. Jones, 47 Or. 40.....	497
Grosse v. State, 11 Tex. App. 364, in dis. opn.....	283
Gynther v. Brown & McCabe, 67 Or. 310.....	341

H

Hague v. Nephi Irrigation Co., 16 Utah, 421.....	616
Hall v. Dunn, 52 Or. 475, in dis. opn.....	23, 546
Hall v. Wolff, 61 Iowa, 559, in dis. opn.	283
Hamilton v. Butler, 33 Or. 370.....	584
Hanley Co. v. Harney Valley Irr. Dist., 93 Or. 78.....	657
Hannan v. Greenfield, 36 Or. 97.....	330
Hanscom v. Hinman, 30 Mich. 419.....	617
Hardtke v. State, 67 Wis. 552, in dis. opn.....	283
Harmon v. Grants Pass Banking & Trust Co., 60 Or. 69.....	218
Harper v. Galloway, 58 Fla. 255.....	64, 95
Harris v. Roofs, 10 Barb. (N. Y.) 489, in dis. opn.....	377
Hawes v. Armstrong, 1 Bing. N. C. 761.....	196, 196
Hayden v. Astoria, 74 Or. 525.....	494, 496, 497
Hayden v. Astoria, 84 Or. 205.....	494, 496, 497, 497
Hayner v. American Popular L. Ins. Co., 69 N. Y. 435, in dis. opn.....	21
Heeser v. Miller, 77 Cal. 192.....	617
Henderson v. Johns, 13 Colo. 280, in dis. opn.....	22
Henry v. Sioux City etc. Co., 70 Iowa, 233, in dis. opn.....	283
Herring-Marvin Co. v. Smith, 43 Or. 315.....	442
Herrlin v. Brown, 71 Or. 470.....	409
Hess & Skinner Eng. Co. v. Turney (Tex. Civ. App.), 207 S. W. 171.....	9, 9

	PAGE
Hill v. State, 94 Miss. 391, in dis. opn.....	266
Hocking Valley Ry. Co. v. Public Utilities Com. of Ohio, 92 Ohio St. 9.....	602
Holmboe v. Morgan, 69 Or. 395.....	496
Holmes v. Olcott, 96 Or. 33.....	180
Hough v. Porter, 51 Or. 318.....	618
Houlton v. Nichol, 95 Wis. 393.....	365
House v. Fowle, 20 Or. 163.....	402
House v. State, 9 Tex. App. 567, in dis. opn.....	283
Huckell v. McCoy, 38 Kan. 53, in dis. opn.....	283
Humbert v. Dunn, 84 Cal. 57.....	39, 40
Hume v. Mullins, 18 Ky. Law Rep. 108.....	321, 322
Hume v. Rogue River Packing Co., 51 Or. 237.....	60
Humphry v. Portland, 79 Or. 430.....	334
Hyland v. Oregon Hassam Paving Co., 74 Or. 1, 362, in dis. opn.....	376, 378, 390

I

Illinois Surety Co. v. John Davis Co., 244 U. S. 376.....	8
In re Continuing Appropriations, 18 Colo. 192.....	46
In re McCormick's Estate, 72 Or. 608.....	347
In re New York Elevated R. R. Co., 70 N. Y. 327.....	62
In re Northcutt, 81 Or. 646.....	471
In re Opinion of Justices, 207 Mass. 601.....	59
In re Taylor, 34 Ch. D. 255.....	507
Iowa R. R. Land Co. v. Carroll County, 39 Iowa, 151.....	193
International Harvester Co. v. Bauer, 82 Or. 686.....	443
Interstate Commerce Com. v. Louisville etc. R. R. Co., 227 U. S. 88.....	602

J

Jackson v. Bechtold Printing Co., 86 Ark. 591.....	398
Jackson v. Sumpter Valley R. Co., 50 Or. 464.....	371
Jenkins v. Hall, 26 Or. 79.....	398, 402
Jenkins v. North Carolina Ore Dressing Co., 65 N. C. 563, in dis. opn.....	283
Jenkins v. Penn. R. Co., 67 N. J. Law, 331.....	552
Jessen v. Donahue, 4 Neb. (Unof.) 838.....	238
Johnson County v. Hewitt, 76 Kan. 816.....	687
Johnson v. City Council, 3 Or. 13.....	685, 691
Johnson v. State, 136 Ga. 804.....	245
Johnson v. Vance, 86 Cal. 128.....	617
Johnston v. Schofner, 23 Or. 111.....	347
Jones v. Jones, 59 Or. 308.....	171
Jones v. Union County, 63 Or. 566.....	60
Julian, Sheriff, v. Ainsworth, 27 Kan. 446.....	193

K

Kansas City S. Ry. Co. v. United States, 231 U. S. 423.....	605
Karr v. Washburn, 56 Wis. 303.....	451
Keady v. United Ry. Co., 57 Or. 325.....	584
Kearney v. Snodgrass, 12 Or. 311.....	319

TABLE OF CASES CITED.

xvii

	PAGE
Kiernan v. Portland, 57 Or. 454.....	501
Kilbourn v. Sunderland, 130 U. S. 505, in dis. opn.....	22
Killingsforth v. City of Portland, 93 Or. 525.....	465
Kilmer v. Moneyweight Scale Co., 36 Ind. App. 568.....	445
Kinkade v. Myers, 17 Or. 470.....	595
Kinnaman v. Kinnaman, 71 Ind. 417, in dis. opn.....	283
Knahtla v. Oregon Short Line R. Co., 21 Or. 136.....	409
Knight & Jilson Co. v. Castle (note), 27 L. R. A. (N. S.) 601.	13
Knut v. Nutt, 83 Miss. 365.....	388
Kohlhagen v. Cardwell, 93 Or. 610.....	409
Krebs v. Livesley, 59 Or. 574.....	124

L

Ladd v. Holmes, 40 Or. 167.....	64, 64, 92
Lane v. Heglund, 244 U. S. 174.....	156, 157, 158, 158
Lauback v. State, 12 Tex. App. 583, in dis. opn.....	283
Learned v. Holbrook, 87 Or. 576.....	329
Leonard v. Southern Pac. Co., 21 Or. 555.....	407
Lewis v. Clark, 66 Or. 461.....	334
Lincoln G. & E. Co. v. Lincoln, 250 U. S. 256.....	609
Links v. Anderson, 86 Or. 508.....	657
Lipscomb v. Condon, 56 W. Va. 416.....	347
Lisenby v. Lisenby, 89 Or. 273.....	634
Little Rock & Fort Smith R. R. Co. v. Perry, 37 Ark. 164.....	644
Little Rock Ry. Co. v. Cavenesse, 48 Ark. 106, in dis. opn.....	282
Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, L. R. A. 1915C, 903.....	687, 687
Lockhart v. Ferrey, 59 Or. 179.....	628
Loewenberg v. Rosenthal, 18 Or. 178.....	190
Long v. Battle Creek, 39 Mich. 323.....	365
Long Creek Building Assn. v. State Ins. Co., 29 Or. 569.....	330
Longfellow v. Huffman, 49 Or. 486.....	320
Love v. Walker, 59 Or. 95.....	70
Lynch v. Pollard, 26 Tex. Civ. App. 103.....	370

Mc

McBratney v. Chandler, 22 Kan. 692.....	362
McCandlish v. Keen, 13 Gratt. (Va.) 615.....	305
McCormick's Estate, In re, 72 Or. 608.....	347
McCrary v. Biggers, 46 Or. 465.....	402
McDaniel v. Chiarmonite, 61 Or. 407.....	441, 442
McDaniel v. United Rys. Co., 165 Mo. App. 678.....	117
McDonald v. People, 126 Ill. 150, in dis. opn.....	282
McDory v. State, 62 Ala. 154, in dis. opn.....	282
McGowan v. Parish, 237 U. S. 285.....	363
McKillip v. McKillip, 8 Barb. (N. Y.) 552.....	306
McKinney v. Commonwealth, 26 Ky. Law Rep. 565, in dis. opn.	264
McPherson v. Acme Lbr. Co., 70 Miss. 649.....	443

M

Madison River Livestock Co. v. Osler, 39 Mont. 244.....	444
Mallory v. City of Olympia, 83 Wash. 499.....	493

	PAGE
Marshall v. Baltimore & O. R. R. Co., 16 How. (U. S.) 314, in dis. opn.....	377
Marshall-Wells Hardware Co. v. Multnomah County, 58 Or. 469.....	686, 688
Martin v. Orndorff, 22 Iowa, 504, in dis. opn.....	283
Martin v. State, 63 Miss. 505, in dis. opn.....	283
Mascall v. Murray, 76 Or. 637.....	620
Matthews v. State, 42 Tex. Cr. Rep. 31.....	259
Mausbach v. Metropolitan Life Ins. Co., 53 How. Pr. (N. Y.) 496, in dis. opn.....	20
Maxwell v. Tillamook County, 20 Or. 495.....	60
Mead v. Harris, 101 Mich. 585.....	238
Menasha Wooden Ware Co., Assignee, v. William Gribble, 37 Land Dec. 329.....	159
Mercer v. Germania Ins. Co., 88 Or. 410.....	331
Merrill v. Wakefield Rattan Co., 1 App. Div. (N. Y.) 118.....	640
Messinger v. Eastern Oregon Land Co., 176 U. S. 58.....	336
Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395.....	683
Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516, in dis. opn....	21
Miles v. Sabin, 90 Or. 129.....	442
Minneapolis etc. Ry. Co. v. Railroad Commission of Wisconsin, 136 Wis. 146.....	599
Miser v. O'Shea, 37 Or. 231.....	190
Mitchell v. State, 38 Tex. Cr. Rep. 170.....	259
Mitchum v. State, 11 Ga. 615, in dis. opn.....	282
Modesto Irr. Co. v. Tregea, 88 Cal. 334.....	662
Monroe v. Withycombe, 84 Or. 328.....	60, 176
Moody v. Miller, 24 Or. 179.....	587
Moore v. Clackamas County, 40 Or. 536.....	620
Moorhouse v. Donica, 13 Or. 435.....	585
Morse v. Union Stock Yard Co., 21 Or. 289.....	411, 412
Mullan v. Clark, 4 Idaho, 186.....	370
Multnomah County v. United States Fid. & Guaranty Co., 87 Or. 198	7
Murray v. Murray, 6 Or. 17.....	319
Murphy v. City of Albina, 22 Or. 106.....	431
Murphy v. Newingham, 151 Ky. 360.....	418

N

Nelson v. Welch, 115 Ind. 270, in dis. opn.....	284
Neppach v. Jordan, 13 Or. 246.....	584
Newton v. State, 21 Fla. 53, in dis. opn.....	282
New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628..	683
Nichols v. Cherry, 22 Utah, 1.....	350
Nichols v. Scott, 12 Vt. 47.....	77
Nitka v. Western Union Tel. Co., 149 Wis. 106.....	59
Normandin v. Gratton, 12 Or. 505.....	77
Northcutt, In re, 81 Or. 646.....	471
Nutt v. Knut, 200 U. S. 12, 362, 363, 363, in dis. opn.....	388

O

Ogden v. Lucas, 48 Ill. 492.....	552
Ogden v. Ogden, 60 Ark. 70.....	400

TABLE OF CASES CITED.

xix

	PAGE
Olcott v. Hoff, 92 Or. 462, in dis. opn.....	270
Oregon Coal Co. v. Coos County, 30 Or. 308.....	649
Oregon Home Builders v. Crowley, 87 Or. 517.....	196
Oregon Home Builders v. Montgomery Inv. Co., 94 Or. 349....	616
Osborn v. Chartevior, Circuit Judge, 114 Mich. 655.....	62

P

Pacific Co. v. Cronan, 82 Or. 388.....	589
Pacific Livestock Co. v. Murray, 45 Or. 103.....	553
Pacific Wood & Coal Co. v. Oswald, 179 Cal. 712.....	9
Palmer v. Portland R. L. & P. Co., 62 Or. 539.....	409
Parker v. Kelsey, 82 Or. 334.....	419
Parr v. United States (C. C.), 153 Fed. 462.....	399
Patton v. Nixon, 33 Or. 159.....	308
Paulson v. City of Portland, 16 Or. 450.....	462
Paulson v. Portland, 149 U. S. 30.....	462
Peabody v. Oregon R. & N. Co., 21 Or. 121.....	371
Pelton Water Wheel Co. v. Oregon Iron Co., 87 Or. 248.....	442
Pennoyer v. Neff, 95 U. S. 714.....	593
People v. Aikin, 66 Mich. 460, in dis. opn.....	286
People v. Baker, 84 App. Div. 469.....	691
People v. Dane, 59 Mich. 550, in dis. opn.	283
People v. Davis, 61 Barb. (N. Y.) 456.....	96
People v. Engle, 118 Mich. 287, in dis. opn.....	272
People v. John Doe, 1 Mich. 451.....	244
People v. Judge, 17 Cal. 547.....	62
People v. Metropolitan Surety Co., 164 Cal. 174.....	347
People v. Miner, 46 Ill. 384.....	44
People v. Mitchell, 62 Cal. 411, in dis. opn.....	282
People v. Pacheco, 27 Cal. 175.....	46
People v. Squire, 107 N. Y. 593.....	62
Perkins v. Burley, Sup. Ct. N. H., July, 1888, in dis. opn.....	283
Perkins v. McCullough, 36 Or. 147.....	371
Peterson v. McCauley (Tex. Civ. App.), 25 S. W. 826.....	186
People v. Brooks, 16 Cal. 11.....	39
Peters v. Tunell, 43 Minn. 473.....	307
Philadelphia v. Stewart, 195 Pa. St. 309.....	7
Pirie v. Chicago Title & Trust Co., 182 U. S. 438.....	480
Pittsburg Coal Co. v. Southern Asphalt & Construction Co., 138 Tenn. 154	9
Poppleton v. Yamhill County, 18 Or. 377.....	649, 684, 690
Porter v. Pettengill, 57 Or. 247.....	421, 617
Portland v. Coffey, 67 Or. 507.....	61
Portland Fish Co. v. Benson, 56 Or. 147.....	60, 63, 91
Portland v. New England Casualty Co., 78 Or. 195.....	8
Potter v. Potter, 43 Or. 149.....	402
Proll v. Dunn, 80 Cal. 220.....	40
Price v. Richardson, 15 Mees. & W. 539.....	197
Public Service Com. of Ind. v. Cleveland etc. Ry. Co. (Ind.), 121 N. E. 116.....	602
Puffer v. American Ins. Co., 48 Or. 475.....	346
Puffer v. Badley, 92 Or. 360.....	76

R	PAGE
Raiha v. Coos Bay Coal & Fuel Co., 77 Or. 275.....	584
Railsback v. Railsback, 92 Or. 623.....	634
Reich v. Mayor etc. of New York, 12 Daly (N. Y.), 72, in dis. opn.	283
Reid v. Alaska Packing Co., 43 Or. 429.....	133, 134
Richardson v. Orth, 40 Or. 252.....	396
Richardson v. Scotts Bluff, 59 Neb. 400, in dis. opn.....	386
Richmond v. Bloch, 36 Or. 590.....	395
Rickabus v. Gott, 51 Mich. 227, in dis. opn.....	283
Riggs v. Adkins, 95 Or. 414.....	395
Ristine v. State of Indiana, 20 Ind. 328.....	37, 38, 39
Ritchey v. People, 23 Colo. 314, in dis. opn.....	266
Roberts v. Northern Pac. R. R. Co., 158 U. S. 1.....	572
Robinson v. Phegley, 93 Or. 299.....	585
Roethler v. Cummings, 84 Or. 442.....	649
Rogers v. Miller, 13 Wash. 82.....	616
Rogers v. State, 60 Ark. 76, 246, in dis. opn.....	266
Rolfe v. Rumford, 66 Me. 564, in dis. opn.....	283
Rose v. Oliver, 32 Or. 447.....	396
Rose v. Truax, 21 Barb. (N. Y.) 361, in dis. opn.....	377
Rowland v. Warren, 10 Or. 129.....	70
Rudolph v. Laudwerlen, 92 Ind. 34, in dis. opn.....	283
Rugenstein v. Ottenheimer, 70 Or. 600, in dis. opn.....	273
Runyan v. Winstock, 55 Or. 202.....	399
Ryan v. Rand, 26 N. H. 15.....	77

S

Salem v. Anson, 40 Or. 339.....	329
Salem Traction Co. v. Anson, 41 Or. 562.....	585
Salt Lake City v. Smith, 104 Fed. 457.....	497
Sasse v. State, 68 Wis. 530, in dis. opn.....	283
School Dist. No. 30 v. Alameda Const. Co., 87 Or. 132.....	7
School Town of Rochester v. Shaw, 100 Ind. 268, in dis. opn..	283
Scott v. Walton, 32 Or. 460.....	677
Scripps v. Reilly, 35 Mich. 371, in dis. opn.....	283
Sealy v. California Lumber Co., 19 Or. 94.....	171
Sharkey v. Portland Gas Co., 74 Or. 327.....	589
Shattuck v. Kincaid, 31 Or. 379.....	39
Shickle v. Watts, 94 Mo. 410.....	124
Simon v. Trummer, 57 Or. 153.....	190
Smith v. Portland, 25 Or. 297.....	649, 649
Snowden v. Crown Cork & Seal Co., 114 Md. 650.....	510
Souter v. Maguire, 78 Cal. 543.....	617
South Portland Lbr. Co. v. Munger, 36 Or. 457, in dis. opn....	22
Stanton v. Embrey, 93 U. S. 549, 362, 363, 364, in dis. opn....	388
State v. Bartlett, 170 Mo. 658, in dis. opn.....	266
State v. Birchard, 35 Or. 484.....	346
State v. Blanchard, 96 Or. 79.....	66
State v. Blodgett, 50 Or. 329, in dis. opn.....	284, 287
State v. Bowling, 3 Tenn. Cas. 110, in dis. opn.....	266
State v. Bybee, 17 Kan. 462, in dis. opn.....	270
State v. Catholic, 75 Or. 367.....	60, 176
State v. Cartwright, 10 Or. 193.....	226

TABLE OF CASES CITED.

xxi

	PAGE
State v. Chambers, 9 Idaho, 673, in dis. opn.....	272
State v. Clark, 134 N. C. 698, 246, in dis. opn.....	263
State v. Comstock, 20 Kan. 655, in dis. opn.....	286
State v. Corson, 67 N. J. Law, 178.....	94
State v. Corvallis & Eastern R. R. Co., 59 Or. 450.....	599
State v. Doherty, 52 Or. 591.....	249
State v. Ellet, 47 Ohio, 90.....	62
State v. Farnham, 82 Or. 211, 228, in dis. opn.....	291
State v. Fisher, 23 Mont. 540, in dis. opn.....	271
State v. Gray, 43 Or. 446, in dis. opn.....	266
State v. Great Northern Ry. Co., 130 Minn. 57.....	602
State v. Griffin, 69 N. H. 1.....	63
State v. Gutekunst, 24 Kan. 252, in dis. opn.....	285
State v. Harris, 46 N. C. 190.....	245
State v. Hatcher, 29 Or. 309, in dis. opn.....	283, 287
State v. Hawkins, 18 Or. 476,239, 240, 242,	248
State v. Hoffman (Tex), 201 S. W. 653.....	193
State v. Hume, 52 Or. 160,	176
State v. Ivanhoe, 35 Or. 150, 241, in dis. opn.....	268
State v. Keasling, 74 Iowa, 528, 246, in dis. opn.....	263
State v. Kennedy, 20 Iowa, 569.....	244, 246
State v. La Grave, 23 Nev. 25.....	39
State v. La Rose, 54 Or. 555.....	232, 288
State v. Leonard, 73 Or. 451.....	227
State v. Marco, 93 Or. 333.....	64
State v. McGuire, 24 Or. 366.....	63, 91
State v. Meyers, 57 Or. 50.....	228
State v. Miller, 43 Or. 325, in dis. opn.....	290
State v. Nashville etc. R. Co., 124 Tenn. 1.....	59
State v. Neeley, 20 Iowa, 108.....	249
State v. O'Donnell, 36 Or. 222, in dis. opn.....	288
State v. Olds, 19 Or. 397.....	249
State v. Pender, 72 Or. 94.....	227
State v. Place, 20 S. D. 489, in dis. opn.....	272
State v. Public Service Com. of Washington, 76 Wash. 492...	608
State v. Richcreek, 167 Ind. 217.....	58
State v. Rideau, 116 La. 247, in dis. opn.....	266
State v. Rider, 78 Or. 318.....	334
State v. Robinson, 143 La. 543, in dis. opn.....	265
State v. Saunders, 14 Or. 300.....	239, 239, 242
State v. Savage, 96 Or. 53.....	91, 92, 96
State v. Searle, 79 Neb. 111.....	44
State v. Shuman, 106 S. C. 150, in dis. opn.....	273
State v. Sloan, 22 Mont. 293, 246, in dis. opn.....	266
State v. Sturgess, 9 Or. 537.....	63
State v. Sullivan, 52 Or. 614.....	226
State Tax on Foreign-held Bonds, 15 Wall. 300.....	683
State v. Thompson, 9 Iowa, 188.....	244, 246
State v. Walton, 50 Or. 142.....	226
State v. Wright, 53 Or. 344.....	60
State ex rel. v. Kelsey, 66 Or. 70.....	502
State ex rel. v. Moore, 50 Neb. 88.....	38, 39, 44
Staver & Walker v. Locke, 22 Or. 519.....	482
Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421.....	617

	PAGE
Stilwell v. Mutual Life Ins. Co. of N. Y., 72 N. Y. 385, in dis. opn.	21
St Louis v. The Ferry Company, 78 U. S. (11 Wall.) 423.....	683
Stone v. Ladd, 40 Or. 606.....	396
Stratton Claimants v. Morris Claimants, 89 Tenn. 497.....	59
Stratton v. Green, 45 Cal. 149.....	39
Stroemer v. Van Orsdel, 74 Neb. 113.....	365
Stroemer v. Van Orsdel, 74 Neb. 132.....	362
Strowbridge v. City of Portland, 8 Or. 67.....	461
Strickland v. Geide, 31 Or. 373.....	553
Stuart v. University Lbr. Co., 66 Or. 546.....	496
Sturgis v. Baker, 43 Or. 236.....	190
Sweeney v. Jackson County, 93 Or. 96.....	171, 497
Sweeney v. McLeod, 15 Or. 330, 371, in dis. opn.....	376, 377, 390, 390
Swift v. Mulkey, 14 Or. 59.....	409

T

Tabor v. Michigan Mutual Life Ins. Co., 44 Mich. 324, in dis. opn.	21, 26
Taft v. Fiske, 140 Mass. 520, in dis. opn.....	283
Talbot v. Garretson, 31 Or. 256.....	493
Tanner v. United States, 32 Court Claims, 192.....	370
Tappan v. Merchants' National Bank, 19 Wall. 490.....	683
Taylor v. Bemiss, 110 U. S. 42.....	363
Templeton v. Linn County, 22 Or. 313.....	337
Templeton v. Morrison, 66 Or. 493.....	587
Tenny v. Mulvaney, 8 Or. 513, in dis. opn.....	284
Territory v. Baker (Johns), 4 N. M. 117.....	245
The Home v. Selling, 91 Or. 428.....	13
Thomsen v. Giebisch, 96 Or. 118.....	333
Tillery v. State, 24 Tex. App. 251, in dis. opn.....	283
Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24.....	10
Title Guaranty & Trust Co. v. Puget Sound Engineering Works, 163 Fed. 168.....	8
Triphonoff v. Sweeney, 65 Or. 299.....	190
Trist v. Child, 88 U. S. 441, in dis. opn.	377, 379, 384, 386, 386, 388, 389
Tucker v. Henniker, 41 N. H. 317, in dis. opn.....	283, 285
Tucker v. Seaman's Aid Society, 7 Met. (Mass.) 188.....	508
Turner v. White, 73 Cal. 299.....	617

U

Union Cent. L. Ins. Co. v. Poettker, 5 Ohio Dec. (Reprint) 263, in dis. opn.....	21
Union C. L. I. Co. v. Cheever, 36 Ohio St. 201, in dis. opn.....	283
Union Refrigerator Transit Co. v. Lynch, 18 Utah, 378.....	684
United Society v. Eagle Bank, 7 Conn. 456.....	338
United States for the Use of Standard Furniture Co. v. Aetna Indemnity Co., 147 Fed. 155.....	8
United States v. Illinois Surety Co., 226 Fed. 653.....	10
United States v. Lowrance, 252 Fed. 122.....	9
United States Nat. Bank v. Shefler, 77 Or. 579.....	587
United States v. Wiltberger, 3 Wash. (C. C.) 515.....	244

TABLE OF CASES CITED.

xxiii

V

	PAGE
Van Cott v. Van Brunt, 2 Abb. N. C. (N. Y.) 283.....	124
Van Den Bosch v. Bouwman, 138 Mich. 624.....	443
Vermont Farm Mach. Co. v. Hall, 80 Or. 308.....	688

W

Wakefield v. Supple, 82 Or. 595.....	488
Walker v. Jack, 31 C. C. A. 462.....	685
Wanser v. Hoos, 60 N. J. Law, 482.....	63
Ward v. James, 84 Or. 375.....	670
Warner v. Zuechel, 19 App. Div. (N. Y.) 494.....	443
Watts v. Spokane, P. & S. Ry. Co., 88 Or. 192.....	371
Watson v. Smith, 7 Or. 448.....	308
Watson v. Sutherland, 72 U. S. (5 Wall.) 74, in dis. opn.....	22
Webster v. Bosanquet, Ann. Cas. 1912C, note 1026.....	328
Weed v. Black, 9 D. C. (2 MacArthur) 268, in dis. opn.....	379
Wharton v. Christie, 53 N. J. Law, 607.....	640
Wheeler v. Sohmer, 233 U. S. 434.....	685
Wheelock v. Richardson, 91 Or. 87.....	76
Whiteaker v. Vanschoiack, 5 Or. 113.....	399
Whitehead v. New York Life Ins. Co., 33 Hun (N. Y.), 425, in dis. opn.....	21
Whitehead v. New York Life Ins. Co., 63 How. Pr. (N. Y.) 394, in dis. opn.....	21
Whitehead v. New York Life Ins. Co., 102 N. Y. 143, in dis. opn.	21
White v. White, 34 Or. 141.....	409
Whipple v. Parker, 29 Mich. 369.....	510
Whittier v. Woods, 57 Or. 432.....	595
Wilcox v. Eastern Oregon Land Co., 176 U. S. 51, 366, in dis. opn.	373
Wild v. Oregon Short Line R. Co., 21 Or. 159.....	409
Wilkes v. Cornelius, 21 Or. 341.....	347
Williams v. People, 24 N. Y. 405.....	95
Willis v. McNeill, 57 Tex. 465, in dis. opn.....	283
Willow Spring Irr. Dist. v. Wilson, 74 Neb. 269.....	663
Winter v. Union Packing Co., 51 Or. 97.....	172, 595
Wirth v. Richter, 63 Or. 114, in dis. opn.....	291
Witter v. Arnett, 8 Ark. 57, in dis. opn.....	22
Wolffe v. Minnis, 74 Ala. 386, in dis. opn.....	282
Wright v. Conservative Inv. Co., 49 Or. 177.....	628
Wright v. Tibbitts, 91 U. S. 252.....	363
W. W. Kimball Co. v. Shawnee Co., 99 Kan. 302.....	691

Y

Yick Wo v. Hopkins, 118 U. S. 356.....	58
Yoe v. People, 49 Ill. 410, in dis. opn.....	282

Z

Zeuske v. Zeuske, 55 Or. 65	346
Zimmerle v. Childers, 67 Or. 465.....	493

OREGON DECISIONS.

**Applied, Approved, Cited, Distinguished, Followed and Overruled in
this Volume.**

A	PAGE
Adams v. Brosius, 69 Or. 513, distinguished.....	115
Advance Thresher Co. v. Ested, 41 Or. 469, cited.....	186
American Contract Co. v. Bullen Bridge Co., 29 Or. 549, cited...	496
American Mortgage Co. v. Hutchinson, 19 Or. 334, cited.....	347

B	PAGE
Baillie v. Columbia Gold Mining Co., 86 Or. 1, cited	32
Baillie v. Columbia Gold Mining Co., 95 Or. 609, approved	33
Baker City Mercantile Co. v. Idaho Cement Pipe Co., 67 Or. 372, cited	8
Barr v. Rader, 33 Or. 376, approved.....	371
Barton v. School Dist. No. 2, 77 Or. 30, applied and approved...	430
Beckett v. City of Portland, 53 Or. 169, applied and approved..	464
Belknap v. Charlton, 25 Or. 41, cited.....	172
Bileu v. Paisley, 18 Or. 47, approved.....	553
Booth v. Moody, 30 Or. 222, approved.....	51
Bowen v. Clarke, 22 Or. 566, approved.....	342
Branson v. Oregonian Ry. Co., 10 Or. 278, cited.....	124
Bridenstine v. Gerlinger Motor Car Co., 86 Or. 411, approved..	318
Brown v. Oregon Lumber Co., 24 Or. 317, approved.....	371
Burrows v. Balfour, 39 Or. 488, approved.....	554

C	PAGE
Callender Navigation Co. v. Pomeroy, 61 Or. 343, cited.....	684
Carnahan Manufacturing Co. v. Beebe-Bowles Co., 80 Or. 124, applied	331
Carney v. Barrett, 4 Or. 171, cited.....	346
Catlin v. Jones, 52 Or. 337, applied and approved.....	321
Caviness v. La Grande Irr. Co., 60 Or. 410, cited.....	619
City of Pendleton v. Jeffery & Bufton, 95 Or. 447, cited.....	9
City of Portland v. Schmidt, 13 Or. 17, approved.....	61
Clatsop County v. Fidelity & Deposit Co. of Maryland, 96 Or. 2, approved	50
Clatsop County v. Wuopio, 89 Or. 713, cited.....	2
Clay v. Clay, 56 Or. 538, approved.....	33
Cohn v. Wemme, 47 Or. 146, distinguished.....	150
Colgan v. Farmers' etc. Bank, 59 Or. 469, cited.....	124
Columbia County v. Consolidated Const. Co., 83 Or. 251, ap- proved	7
Conklin v. La Dow, 33 Or. 354, cited.....	319
Cooper v. Thomason, 30 Or. 161, cited 396, applied.....	451

	PAGE
Coyote G. & S. M. Co. v. Ruble, 9 Or. 121, cited.....	346
Crawford v. Wist, 26 Or. 596, cited.....	584

D

De Vol v. Citizens' Bank, 92 Or. 606, cited.....	395
D'Arcy v. Sanford, 81 Or. 323, cited.....	587
Davis v. First Nat. Bank of Albany, 86 Or. 474, applied 561, cited	587
Deardorf v. Idaho Nat. Harvester Co., 90 Or. 426, cited.....	688
Devlin v. Moore, 64 Or. 433, cited	138, 190
Devlin v. Moore, 64 Or. 464, cited	138
Dickenson v. Henderson, 90 Or. 408, approved.....	471
Durkee v. Carr, 38 Or. 189, applied.....	331

E

Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1, cited.....	60
Elder v. Bourke, 27 Or. 363, cited.....	493

F

Farnum v. Loomis, 2 Or. 29, approved.....	399
Fitch v. Howitt, 32 Or. 396, approved.....	53
Foreman v. School Dist. No. 25, 81 Or. 587, approved.....	430
Fouts v. Hood River, 46 Or. 492, approved.....	63
Francis v. Bohart, 76 Or. 1, approved.....	442
Francis v. Mutual Life Ins. Co., 61 Or. 141, cited.....	346
French v. Cresswell, 13 Or. 418, approved.....	553

G

Galvin v. Brown & McCabe, 53 Or. 598, approved.....	340
Gard v. Peck, 91 Or. 33, approved.....	657
Garnsey v. County Court, 33 Or. 201, approved.....	649
Goodwin v. Tuttle, 70 Or. 424, cited.....	620
Gray v. Jones, 47 Or. 40, approved.....	497
Gynther v. Brown & McCabe, 67 Or. 310, approved.....	341

H

Hall v. Dunn, 52 Or. 475, cited in dis. opn. 23, cited with ap- proval	546
Hamilton v. Butler, 33 Or. 370, cited.....	584
Hanley Co. v. Harney Valley Irr. Dist., 93 Or. 78, approved....	657
Hannan v. Greenfield, 36 Or. 97, applied.....	330
Harmon v. Grants Pass Banking & Trust Co., 60 Or. 69, ap- proved	218
Hayden v. Astoria, 74 Or. 205, cited 494, 496, approved	497, 497
Hayden v. Astoria, 74 Or. 525, cited 494, 496, approved.....	497
Herring-Marvin Co. v. Smith, 43 Or. 313, approved.....	442
Herrlin v. Brown, 71 Or. 470, applied.....	409
Holmboe v. Morgan, 69 Or. 395, cited.....	496
Holmes v. Olcott, 96 Or. 33 applied.....	180
Hough v. Porter, 51 Or. 318, applied.....	618
House v. Fowle, 20 Or. 163, cited.....	402
Hume v. Rogue River Packing Co., 51 Or. 237, cited.....	60

	PAGE
Humphry v. Portland, 79 Or. 430, approved.....	334
Hyland v. Oregon Hassam Paving Co., 74 Or. 1, approved 362, cited in dis. opn.....	376, 378, 390

I

In re McCormick's Estate, 72 Or. 608, cited.....	347
In re Northcutt, 81 Or. 646, approved.....	471
International Harvester Co. v. Bauer, 82 Or. 686, approved.....	443

J

Jackson v. Sumpter Valley R. Co., 80 Or. 464, approved.....	371
Jenkins v. Hall, 26 Or. 79, distinguished 398, cited.....	402
Jones v. Jones, 59 Or. 308, cited.....	171
Jones v. Union County, 63 Or. 566, cited.....	60
Johnson v. City Council, 3 Or. 13, cited.....	685, 691
Johnston v. Schofner, 23 Or. 111, cited.....	347

K

Keady v. United Ry. Co., 57 Or. 325, cited.....	584
Kearney v. Snodgrass, 12 Or. 311, cited.....	319
Kiernan v. Portland, 57 Or. 454, approved and applied.....	501
Killingsworth v. City of Portland, 93 Or. 525, approved.....	465
Kinkade v. Myers, 17 Or. 470, cited.....	595
Knahtla v. Oregon Short Line R. Co., 21 Or. 136, cited.....	409
Kohlhagen v. Cardwell, 93 Or. 610, cited.....	409
Krebs v. Livesley, 59 Or. 574, cited.....	124

L

Ladd v. Holmes, 40 Or. 167; applied 64, cited.....	64, 92
Learned v. Holbrook, 87 Or. 576, applied	329
Leonard v. Southern Pac. Co., 21 Or. 555, applied and approved..	407
Lewis v. Clark, 66 Or. 461, approved.....	334
Links v. Anderson, 86 Or. 508, approved.....	657
Lisenby v. Lisenby, 89 Or. 273, approved.....	634
Lockhart v. Ferrey, 59 Or. 179, cited.....	628
Loewenberg v. Rosenthal, 18 Or. 178 cited.....	190
Long Creek Building Assn. v. State Ins. Co., 29 Or. 569, ap- proved	330
Longfellow v. Huffman, 49 Or. 486, applied and approved.....	320
Love v. Walker, 59 Or. 95, cited with approval.....	70

Mc

McCormick's Estate, In re, 72 Or. 608, cited.....	347
McCrary v. Biggers, 46 Or. 465, approved.....	402
McDaniel v. Chiarmonite, 61 Or. 407, cited 441, approved.....	442

M

Marshall-Wells Hardware Co. v. Multnomah County, 58 Or. 469, cited	686, 688
Mascall v. Murray, 76 Or. 637, cited.....	620
Maxwell v. Tillamook County, 20 Or. 495, cited.....	60

	PAGE
Mercer v. Germania Ins. Co., 88 Or. 410, applied.....	31
Miles v. Sabin, 90 Or. 129, approved.....	442
Miser v. O'Shea, 37 Or. 231, cited.....	190
Monroe v. Withycombe, 84 Or. 328, cited 60, approved.....	176
Moody v. Miller, 24 Or. 179, cited.....	587
Moore v. Clackamas County, 40 Or. 536, cited.....	620
Moorhouse v. Donica, 13 Or. 435, approved.....	585
Morse v. Union Stock Yard Co., 21 Or. 289, applied 411, cited..	412
Multnomah County v. United States Fid. & Guaranty Co., 87 Or. 198, approved	7
Murphy v. City of Albina, 22 Or. 106, applied.....	431
Murray v. Murray, 6 Or. 17, cited.....	319

N

Neppach v. Jordan, 13 Or. 246, cited.....	584
Normandin v. Gratton, 12 Or. 505, applied.....	77
Northcutt, In re, 81 Or. 646, approved.....	471

O

Olcott v. Hoff, 92 Or. 462, cited in dis. opn.....	270
Oregon Coal Co. v. Coos County, 30 Or. 308, approved.....	649
Oregon Home Builders v. Crowley, 87 Or. 517, cited.....	196
Oregon Home Builders v. Montgomery Inv. Co., 94 Or. 349, cited.	616

P

Pacific Co. v. Cronan, 82 Or. 388, applied.....	589
Pacific Livestock Co. v. Murray, 45 Or. 103, approved.....	553
Palmer v. Portland R. L. & P. Co., 62 Or. 539, cited.....	409
Parker v. Kelsey, 82 Or. 334, approved.....	419
Patton v. Nixon, 33 Or. 169, approved and applied.....	308
Paulson v. City of Portland, 16 Or. 450, approved.....	462
Peabody v. Oregon R. & N. Co., 21 Or. 121, approved.....	371
Pelton Water Wheel Co. v. Oregon Iron Co., 87 Or. 248, ap- proved	442
Perkins v. McCullough, 36 Or. 147, approved.....	371
Poppleton v. Yamhill County, 18 Or. 377, approved 649, cited	624, 690
Porter v. Pettingill, 57 Or. 247, applied and approved 617, ap- plied	421
Portland v. Coffey, 67 Or. 507, approved.....	61
Portland Fish Co. v. Benson, 56 Or. 147, approved 60, 62, ap- plied	91
Portland v. New England Casualty Co., 78 Or. 195, cited.....	8
Potter v. Potter, 43 Or. 149, approved.....	402
Puffer v. American Ins. Co., 48 Or. 475, approved.....	346
Puffer v. Badley, 92 Or. 360, approved.....	76

R

Raiha v. Coos Bay Coal & Fuel Co., 77 Or. 275, applied and ap- proved	584
Railsback v. Railsback, 92 Or. 623, approved.....	634
Reid v. Alaska Packing Co., 43 Or. 429, applied.....	133, 134
Richardson v. Orth, 40 Or. 252, approved.....	396

	PAGE
Richmond v. Bloch, 36 Or. 590, distinguished.....	395
Riggs v. Adkins, 95 Or. 414, cited.....	395
Robinson v. Phegley, 93 Or. 299, applied and approved.....	585
Roethler v. Cummings, 84 Or. 442, approved.....	649
Rose v. Oliver, 32 Or. 447, approved.....	396
Rowland v. Warren, 10 Or. 129, cited with approval.....	70
Rugenstein v. Ottenheimer, 70 Or. 600, applied in dis. opn.....	273
Runyan v. Winstock, 55 Or. 202, approved.....	399

S

Salem v. Anson, 40 Or. 339, applied.....	329
School Dist. No. 30 v. Alameda Const. Co., 87 Or. 132, approved.	7
Scott v. Walton, 32 Or. 460, applied.....	677
Sealy v. California Lumber Co., 19 Or. 94, cited.....	171
Sharkey v. Portland Gas Co., 74 Or. 327, cited.....	589
Shattuck v. Kincaid, 31 Or. 379, cited with approval.....	39
Simon v. Trummer, 57 Or. 153, cited.....	190
Smith v. Portland, 25 Or. 297, approved 649, applied.....	649
South Portland Lbr. Co. v. Munger, 36 Or. 457, cited in dis. opn.	22
State v. Birchard, 35 Or. 484, cited	346
State v. Blanchard, 96 Or. 79, approved.....	66
State v. Blodgett, 50 Or. 329, cited in dis. opn.....	284, 287
State v. Cartwright, 10 Or. 193, distinguished.....	226
State v. Catholic, 75 Or. 367, approved 60, approved.....	176
State v. Corvallis & Eastern R. R. Co., 59 Or. 450, approved....	599
State v. Doherty, 52 Or. 591, applied.....	249
State v. Farnham, 82 Or. 211, approved and followed 228, cited in dis. opn.....	291
State v. Gray, 43 Or. 446, cited in dis. opn.	266
State v. Hatcher, 29 Or. 309, cited in dis. opn.....	283, 287
State v. Hawkins, 18 Or. 476, approved 239, applied 239, cited	242, 248
State v. Hume, 52 Or. 1, approved	60, 176
State v. Ivanhoe, 35 Or. 150, distinguished 241, cited in dis. opn..	268
State v. La Rose, 54 Or. 555, approved 232, cited in dis. opn....	283
State v. Leonard, 73 Or. 451, approved.....	227
State v. Marco, 93 Or. 333, approved.....	64
State v. McGuire, 24 Or. 366, approved	63, 91
State v. Meyers, 57 Or. 50, distinguished.....	228
State v. Miller, 43 Or. 325, cited in dis. opn.....	290
State v. O'Donnell, 36 Or. 222, cited in dis. opn.....	288
State v. Olds, 19 Or. 397, cited and applied.....	249
State v. Pender, 72 Or. 94, approved.....	227
State v. Rider, 78 Or. 318, approved.....	334
State v. Saunders, 14 Or. 300, approved 239, applied 239, cited..	242
State v. Savage, 96 Or. 53, cited 91, applied 92, approved.....	96
State v. Sturgess, 9 Or. 537, approved.....	63
State v. Sullivan, 52 Or. 614, cited.....	226
State v. Walton, 50 Or. 142, distinguished.....	226
State v. Wright, 53 Or. 344, cited.....	60
State ex rel. v. Kelsey, 66 Or. 70, approved.....	502
Staver & Walker v. Locke, 22 Or. 519, cited.....	482
Stone v. Ladd, 40 Or. 606, approved.....	396
Strowbridge v. City of Portland, 8 Or. 67, approved.....	461

	PAGE
Stuart v. University Lbr. Co., 66 Or. 546, cited.....	496
Sturgis v. Baker, 43 Or. 236, approved.....	190
Strickland v. Geide, 31 Or. 373, approved.....	353
Sweeney v. Jackson County, 93 Or. 96, cited 171, approved.....	497
Sweeney v. McLeod, 15 Or. 330, distinguished 371, cited in dis. opn.	376, 377, 390, 390
Swift v. Mulkey, 14 Or. 59, cited.....	409

T

Talbot v. Garretson, 31 Or. 256, cited.....	493
The Home v. Selling, 91 Or. 428, cited.....	13
Thomsen v. Giebisch, 96 Or. 118, approved.....	333
Templeton v. Linn County, 22 Or. 313, distinguished.....	337
Templeton v. Morrison, 66 Or. 493, cited	587
Tenny v. Mulvaney, 8 Or. 513, cited in dis. opn.	284
Triphonoff v. Sweeney, 65 Or. 299, cited.....	190

U

United States Nat. Bank v. Sheffer, 77 Or. 579, cited.....	587
--	-----

V

Vermont Farm Mach. Co. v. Hall, 80 Or. 308 cited.....	688
---	-----

W

Wakefield v. Supple, 82 Or. 595, cited.....	488
Ward v. James, 84 Or. 375, cited.....	670, 679
Watson v. Smith, 7 Or. 448, distinguished.....	308
Watts v. Spokane, P. & S. Ry. Co., 88 Or. 192, approved.....	371
Wild v. Oregon Short Line R. Co., 21 Or. 159, cited.....	409
Wilkes v. Cornelius, 21 Or. 341, cited.....	347
Winter v. Union Packing Co., 51 Or. 97, cited.....	172, 595
Wirth v. Richter, 68 Or. 114, cited in dis. opn.....	291
Wheelock v. Richardson, 91 Or. 87, approved.....	76
Whiteaker v. Vanschoiack, 5 Or. 113, approved.....	399
White v. White, 34 Or. 141, cited.....	409
Whittier v. Woods, 57 Or. 432, cited.....	595
Wright v. Conservative Inv. Co., 49 Or. 177, cited.....	628

Z

Zeuske v. Zeuske, 55 Or. 65, cited.....	346
Zimmerle v. Childers, 67 Or. 465, applied and approved.....	493

STATUTES OF OREGON.

Cited and Construed in this Volume.

LORD'S OREGON LAWS.		LORD'S OREGON LAWS (Continued).	
SEC.	PAGE	SEC.	PAGE
27	187, 190	1914	221, 247
97	635, 641	3551	689, 689, 689, 690, 691
102	493	2551 amd. 1907, c. 268	1, 80
139 (in dis. opn.)	274	3553	689, 690, 690, 691
155	404, 410	3553 amd. 1907, c. 268	680
157	347, 347	4052	426, 427
170	254	4053	427
..255, 256 (in dis. opn.)	277	4054	427
201	579, 586	4777 amd. 1919, p. 175	529, 532
328	567, 575	5257 amd. 1915, p. 60	
380	334, 338, 33979, 79, 83, 83, 99	
390 amd. 1917, p. 126	667, 672	5283	79, 84
414	543	5360 (Apart from void	
507	630, 631, 633	Amdts. of 1915 and	
550	579	1917)	54, 55,
554 amd. 1913, p. 618		56, 60, 61, 61, 62, 64,	92
.....629, 629, 630,	630	5360 amd. 1915, p. 31, and	
618	432	1917, p. 848	
619	43254, 57, 60, 61	
620	432	5361	57
622	432	5833	122
707	219, 230	5870	590
710	140, 140, 142	6266	48, 49
713	486, 496	6266 amd. 1913, p. 59	
717	486, 4962, 2, 3, 6, 7, 8, 13	
718	486, 496	6375	334, 337, 339
790	74, 77	6617	538, 544, 544
793	335, 343	6618	536, 544, 545
799 subd. 34	335, 343	6683 subd. 5	122
804	390, 395, 446, 451	6687	122
808 subd. 2	195, 196	6701 amd. 1913, p. 465	122
818	549, 549, 554	6887	596, 598
916	344, 347	6906	595, 596, 598, 610
1117	348, 349, 350	6910	597, 608
1117 amd. 1915, p. 91		6911	608
.....344, 349, 350,	350	6912	608
1319	468, 468, 471, 471	6913	608
1371	221, 248	7315 amd. 1907, p. 152	399
1491 subds. 2, 3	80, 99	7315 amd. 1917, p. 687	391, 396
1626	219, 227	7315 amd. 1919, p. 622	399, 402
1902	236, 247	7318 amd. 1917, c. 331	402
1909	221, 247, 248	7344	66, 69
1910	247		

STATUTES OF OREGON—Continued.			
LORD'S OREGON LAWS (Continued).		LORD'S OREGON LAWS (Continued).	
SEC.	PAGE	SEC.	PAGE
7347	66, 69	523	248
7398	390, 395	893	689
Title XLIII, c. VI.....	544	894	690
DEADY'S CODE.		HILL'S ANN. LAWS.	
3	248	87	331
511	247	1730	249
518	247		

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.	
Article I, § 17	343, 346
Article I, § 18	596, 604
Article I, § 20	54, 55, 60
Article I, § 27	291
Article IV, § 20	79, 84, 85, 85
Article IV, § 23.....	55, 61, 64, 80, 84, 85, 85, 92, 92, 92
Article VII, § 3	14, 343, 346
Article IX, § 4.....	33, 34, 35, 36, 37, 37, 42, 45, 45
Article IX, § 7	36
Article XI, § 3	122

CHARTERS OF CITIES.

Cited and Construed in this Volume.	
PORTLAND.	
Portland v. New England Casualty Co.....	48
ROSEBURG.	
Giles v. Roseburg	459

SUPREME COURT RULES.

Cited in this Volume.	
Rule 8 (89 Or. 713).....	1, 2

STATUTES OF THE UNITED STATES.

Cited and Construed in this Volume.

STATUTES AT LARGE.**PAGE**

Act March 3, 1877, c. 107.....	610
Act March 3, 1891, 561 (26 Stats. 1095, 1099).....	151, 157, 159

UNITED STATES COMPILED STATUTES.

Sections 4674-4678	610
Sections 5113, 5116	151, 157

FEDERAL STATUTES ANNOTATED.

6 Fed., § 1, p. 300.....	156
--------------------------	-----

UNITED STATES CONSTITUTION.

Fourteenth Amendment	54
----------------------------	----

SESSION LAWS.

Cited, Applied and Construed in this Volume.

Laws 1876, p. 69	689
Laws 1887, p. 97	532
Laws 1893, p. 145	91
Laws 1899, p. 202	532
Laws 1905, c. 111, p. 209	532
Laws 1905, c. 182, p. 312	56, 57
Laws 1907, c. 40, p. 52.....	56, 57, 60, 62
Laws 1907, c. 87, p. 152	399
Laws 1907, c. 268, p. 485	680, 680, 689, 690
Laws 1909, c. 46, p. 93	532
Laws 1911, c. 223, p. 378	664
Laws 1913, c. 27, p. 59	2, 2, 3, 6, 7, 8, 13
Laws 1913, c. 37, p. 69	422, 422, 423, 426, 435
Laws 1913, c. 128, p. 225	163, 175
Laws 1913, c. 172, p. 301	422, 423, 423, 427, 429, 430, 431
Laws 1913, c. 238, p. 465	122
Laws 1913, c. 320, p. 618	629, 629, 630, 630
Laws 1913, c. 353, p. 715	532
Laws 1913, c. 361, p. 748	595, 598
Laws 1915, c. 16, p. 31	54, 54, 55, 57, 60, 60
Laws 1915, c. 49, p. 60	
.....79, 79, 80, 80, 81, 82, 83, 85, 85, 86, 90, 98, 98, 99	
Laws 1915, c. 83, p. 91	344, 349
Laws 1915, c. 188, p. 226	79, 84, 84, 163, 163, 175
Laws 1915, c. 257, p. 366 (Amd. 1917, c. 243, p. 465).....	
.....33, 34, 34, 42, 48, 48	
Laws 1915, c. 287, p. 443	33, 33, 34, 34, 34, 35, 40, 42, 43, 43
Laws 1917, c. 243, p. 465.....	33, 34, 34, 42, 48, 48

SESSION LAWS—Continued.	PAGE
Laws 1917, c. 95, p. 126	15, 27, 667, 672
Laws 1917, c. 152, p. 196	422, 422, 423, 423, 423, 423, 423, 426, 429, 434, 435
Laws 1917, c. 243, p. 465	33, 34, 34, 42, 43, 45
Laws 1917, c. 333, p. 687	391, 397
Laws 1917, c. 346, p. 721	499, 500
Laws 1917, c. 357, p. 743 (sec. 19).....	650, 658, 662, 662
Laws 1917, c. 357, p. 743 (sec. 41, subds. "a," "d").....	650, 650, 654, 655, 656
Laws 1917, c. 362, p. 785	80, 80, 81, 81, 84, 98, 98
Laws 1917, c. 409, p. 848	54, 54, 55, 57, 60, 60, 65
Laws 1919, c. 31, p. 46	80, 81, 81, 98, 98
Laws 1919, c. 119, p. 175	529, 531, 532, 534
Laws 1919, c. 120, p. 177	529, 529, 529, 531, 531, 533, 534, 534, 536, 537
Laws 1919, c. 367, p. 648	175
Laws 1919, c. 352, p. 622	399

CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Submitted on motion to strike brief February 28, allowed April 8,
1919.

CLATSOP COUNTY v. WUOPIO.*

(179 Pac. 657.)

Appeal and Error—Filing Brief—Time—Dismissal.

1. Respondent's brief filed after the 20 days from service of appellants' brief allowed by Supreme Court Rule 8 (89 Or. 713, 173 Pac. viii) will be stricken on motion; time not having been extended.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc.

On motion to strike respondent's brief.

ALLOWED.

Mr. J. J. Barrett and Mr. E. E. Mathison, for the motion.

Mr. Edw. C. Judd, Dist. Atty., contra.

PER CURIAM.—1. The defendants appealed from a judgment rendered against them, and on September 18, 1918, served the plaintiff with a copy of their brief on appeal, and filed the required num-

*This opinion should have been published in 95 Or. 30, where the opinion on the merits is found. REPORTER.

ber of copies with the clerk of this court. No brief was filed by the plaintiff until January 27, 1919. Defendants move to strike said brief from the files because not filed within the time prescribed by Rule 8 of this court (89 Or. 713, 173 Pac. 8), which requires the respondent to file his brief within twenty days from the service of the appellant's brief upon him, unless the time for filing has been extended. The record does not show any extension of time and no reason for the long delay is given by the respondent; therefore, the motion to strike must be allowed. MOTION ALLOWED.

Submitted on briefs March 2, reversed and judgment entered April 6, 1920.

**CLATSOP COUNTY v. FIDELITY & DEPOSIT CO.
OF MARYLAND.**

(189 Pac. 207.)

**Highways—Statute Protecting Persons Supplying Public Contractor
Should be Liberally Construed.**

1. A statute enacted to protect persons supplying a contractor performing a public work with labor or materials for any portion of the work provided for should be given a liberal construction in order to carry out the legislative intent.

**Highways—Person Supplying Meats to Subcontractor on Public
Work Held a Furnisher of "Labor and Materials" Within Con-
tractor's Bond.**

2. Meats used in a necessary boarding camp for laborers employed on a public highway in a sparsely settled region provided for in a contract secured by bond pursuant to Section 6266, L. O. L., as amended by Laws of 1913, page 59, are included within the terms "labor and materials," and the person furnishing them to a subcontractor protected by the statutory bond.

**Highways—Evidence Held to Show Necessity of Boarding Camps on
Public Work Entitling One Supplying Meat to Sue on Contrac-
tor's Bond.**

3. In action on bond of contractor for public work given pursuant to Section 6266, L. O. L., as amended by Laws of 1913, page

59, brought by one who furnished meats to a boarding camp for laborers maintained by subcontractor, evidence held to support requested finding that it was necessary for prosecution of work that subcontractor maintain boarding camp at each of his construction camps; region being sparsely settled.

From Multnomah: GEORGE W. STAPLETON, Judge.

In Banc.

This is an action instituted by Clatsop County for the use and benefit of Frye & Company, a corporation, engaged in the sale of meat and meat products with its principal office in Seattle, Washington, and one of its branches at Portland, Oregon, against the defendants, who are the original contractor, its surety, and subcontractors, upon a bond guaranteeing the performance of a contract for the construction of a part of the Columbia Highway. The cause was tried by the court without the intervention of a jury.

Upon the trial Frye & Company, the use plaintiff, introduced testimony showing substantially the following facts: In May, 1914, Boyajohn-Arnold Company entered into a contract with Clatsop County to build a portion of Columbia Highway, agreeing to make payment promptly for labor and materials. Pursuant to the requirements of Section 6266, L. O. L., as amended (Laws 1913, p. 59), Boyajohn-Arnold Company, as principal, and Fidelity & Deposit Company of Maryland, as surety, voluntarily gave the required bond to the county, conditioned, among other things, to "pay all laborers, mechanics, subcontractors and materialmen and all persons who shall supply such laborers, mechanics or subcontractors with materials, supplies or provisions for carrying on such work and all just debts, dues and demands incurred in the performance of such work." Boyajohn-Arnold Company sublet the contract to Peterson & Johnson, copartners, and they

in turn sublet a portion of the contract involving the clearing and grading of a portion of the highway to F. A. Hadley. Hadley fully performed his subcontract. The portion of the highway which Hadley graded ran through an unsettled region remote from any city or boarding place, and extended over a distance of about ten miles. He employed a crew of itinerant men thereon ranging in number from thirty-five to one hundred. Hadley found it essential to establish two boarding camps along the line of the work whereat the men could eat. Except for the presence of his camps the men would have quit the work and could not have been kept together. There was no other place for the men to eat when on the job but at Hadley's camps. Hadley was compelled to establish camps for his laborers, at which he boarded them. It was necessary to board the laborers at the scene of the work in order to retain their services and prosecute the work. Such work cannot be performed in such an unsettled country unless boarding places for the laborers be maintained upon the work. The men paid no cash for their board. Hadley credited each man with wages in an amount large enough to cover the value of the man's labor. In paying the men each man received a check equal to the value of his labor, less the value of his board, which Hadley figured at the rate of thirty cents per meal. For example, if a man's labor had a value of \$3 per day he received therefor his board plus a check for \$2.10.

Relying upon the protection given it by such bond, Frye & Company, the use plaintiff, sold the meats, the price of which is the subject of this action, to Hadley for use in his boarding camps. All of them were so used. Relator, Frye & Company, has never been paid for the meats, although demand therefor was made

upon each of the defendants and respondents. Defendant F. A. Hadley was not served with a summons and did not answer.

At the close of plaintiff's case in chief respondents moved for a judgment. The motion was granted, and judgment rendered accordingly, from which plaintiff appeals. The defendants introduced no testimony. Therefore there is no controversy in regard to the facts.

The trial court found, in addition to the formal findings as to the corporate character of some of the parties, the partnership of Peterson & Johnson, the execution of the contract and bond, the description of the highway and the furnishing of the supplies of meat by the use plaintiff to subcontractor Hadley, substantially in accordance with the above statement, finding No. 10 being worded as follows:

“That the said meats so furnished to said defendant F. A. Hadley were used and consumed by him in a boarding-house maintained and operated by said defendant F. A. Hadley, along the line of said work for the convenience of said men, and whereat a portion of the men employed by said F. A. Hadley on the work performed by him on said Columbia Highway took their meals; that said men so employed on said work were paid by the said F. A. Hadley wages for the labor performed by them at the rate of \$2.25 to \$3.50 per day for each day said men were actually employed on said work, in full payment for their services, and the said F. A. Hadley charged each man so employed on said work at the rate of thirty cents per meal for each meal consumed by him at said boarding-house, and at the time of the payment of the wages earned by said men, as aforesaid, the said F. A. Hadley deducted from the amount of the check given in payment for such labor, the amount due to said F. A. Hadley for the meals so furnished by him to his said employees.”

As a conclusion of law the trial court found *inter alia* as follows:

“That the said meats so furnished by the said relator to the said F. A. Hadley did not come within the provisions of the contract referred to in the findings of fact or the provisions of Section 6266, Lord’s Oregon Laws, as amended by Chapter 27 of the Laws of Oregon of 1913, inasmuch as they did not, nor do they, constitute labor or material for the prosecution of the work provided for in the contract.”

REVERSED. JUDGMENT RENDERED.

For appellant there was a brief submitted over the names of *Messrs. Teal, Minor & Winfree* and *Mr. Thaddeus W. Veness*.

For respondents there was a brief prepared and submitted by *Mr. Palmer L. Fales, Mr. Malcolm H. Clark, Mr. Bert W. Henry* and *Mr. Harrison Allen*.

BEAN, J.—It is the contention of the plaintiff that food used in a necessary boarding-house for laborers employed in the prosecution of public work provided for in a contract secured by a bond given pursuant to Section 6266, L. O. L., as amended, is included within the terms “labor and materials,” and protected by the statutory bond.

It appears that upon the trial of the case the theory of the respondents was to the contrary. There is some contention upon the part of the respondents that the trial court did not find that the board of the men engaged in the labor was necessary “for any prosecution of the work.” We do not so understand the findings. In any event, the undisputed testimony in the case is that the board of the men furnished by the subcontractor near the work was absolutely necessary

in order to retain the laborers and obtain their assistance in the prosecution of the work.

1. Section 6266, L. O. L. as amended, was enacted to protect all persons supplying a contractor performing public work, labor or materials for any prosecution of the work provided for in the contract. The law was intended for the benefit of the individual assisting in the furtherance of the undertaking, and also for the benefit of the public. It should be given a liberal construction in order to carry out the legislative intent: *School Dist. No. 30 v. Alameda Const. Co.*, 87 Or. 132 (169 Pac. 507, 788); *Columbia County v. Consolidated Const. Co.*, 83 Or. 251, 260, 268 (163 Pac. 438); *Multnomah Co. v. United States Fidelity & Guaranty Co.*, 87 Or. 198, 207 (170 Pac. 525, L. R. A. 1918C, 685); *Philadelphia v. Stewart*, 195 Pa. St. 309 (45 Atl. 1056).

2. Our statute is practically a counterpart of the federal act of August 13, 1894, from which it was derived. Since this case was tried in the Circuit Court, a parallel case has been determined by the Supreme Court of the United States: *Brogan v. National Surety Co.*, 246 U. S. 257 (62 L. Ed. 703, L. R. A. 1918D, 776, 38 Sup. Ct. Rep. 250). The facts in that case were these: The Standard Contracting Company undertook to deepen the channel of St. Mary's River, Michigan, located "in a comparative wilderness at some distance from any settlement. There were no hotels or boarding-houses," and the contractor "was compelled to provide board and lodging for its laborers." Groceries and provisions of the value of \$4,613.87 furnished it by Brogan were used by the contractor in its boarding-house, and were supplied "in the prosecution of the work provided for in the contract and the bond upon which the suit is based. They were necessary to and wholly consumed in such work." The

number of men employed averaged eighty. They were "boarded" by the contractor under an arrangement by which the contractor was to board them and deduct therefor \$22.50 per month from their wages. The contract and the bond executed by the National Surety Company bound the contractor to "make full payment to all persons supplying him with labor or materials in the prosecution of the work provided for in" the contract.

It was held that groceries and provisions furnished the contractor, and so consumed by the laborers, were materials used "in the prosecution" of the work within the meaning of the federal act and the bond given to secure the contract.

Without taking into consideration the extra statutory words contained in the bond in suit in the present case, those things which are necessary in the prosecution of the work provided for in the contract are protected as "labor and materials," although such supplies are not physically incorporated into the work. Such materials are embraced within the provisions of Section 6266, L. O. L. as amended, and are included in the bond given pursuant thereto: *Brogan v. National Surety Co.*, 246 U. S. 257 (62 L. Ed. 703, L. R. A. 1918D, 776, 38 Sup. Ct. Rep. 250); *Portland v. New England Casualty Co.*, 78 Or. 195, 201, 202 (152 Pac. 253); *Baker City Mercantile Co. v. Idaho Cement Pipe Co.*, 67 Or. 372, 377, 379 (136 Pac. 23); *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376 (61 L. Ed. 1206, 37 Sup. Ct. Rep. 614); *Title Guaranty & Trust Co. v. Puget Sound Engineering Works*, 163 Fed. 168, 178, 179 (89 C. C. A. 618); *City Trust, Safe Deposit & Surety Co. v. United States to Use of Bryant*, 147 Fed. 155, 158 (77 C. C. A. 397); *United States for the Use of Standard Furniture Co. v. Aetna Indemnity Co.*, 40

Wash. 87, 91, 92 (82 Pac. 172); *Pittsburg Coal Co. v. Southern Asphalt & Construction Co.*, 138 Tenn. 154 (196 S. W. 490, 491); *City of Pendleton v. Jeffery & Bufton*, 95 Or. 447 (188 Pac. 176).

Our statute is fully as broad as the federal act. If there is any difference, the Oregon act is garnished with the stronger words where provision is made for security for the payment of "labor or materials for *any* prosecution of the work provided for in such contracts."

Hess & Skinner Eng. Co. v. Turney (Tex. Civ. App.), 207 S. W. 171, was an act on a contractor's bond required by a statute like ours. The syllabus reads thus:

"Where a contractor, in constructing a bridge, in order to facilitate work, had laborers take their meals in camp instead of going into town for them, the labor in cooking such meals was labor performed in the prosecution of the work, and for such the contractor's surety would be liable."

It is stated in the opinion at page 175 of 207 S. W.:

"Food was essential to the laborers, and it was necessary that it be cooked. It facilitated the work to have laborers take their meals in the camp, instead of going to town for them."

In *Pacific Wood & Coal Co. v. Oswald*, 179 Cal. 712 (178 Pac. 854), it was held that items furnished a subcontractor, consisting of hay and feed for horses and mules used in doing road work, are covered by a bond requiring a public contractor under such a statute to pay for materials furnished for or in doing the work, irrespective of the presence or absence of the word "supplies." The opinion was to the same effect in the case of *United States v. Lowrance*, 252 Fed. 122 (164 C. C. A. 234). It is there stated:

“The act of Congress and the surety bonds given according to its provisions should be liberally, not narrowly, construed. The typical lien laws of the states and the decisions of the courts upon them should, for the most part, be put aside.”

The following have been held nominated in such a bond: Trucking from a steamer landing on an island where the work was to be done to the particular locality of the work: *American Surety Co. v. Lawrenceville Cement Co.* (C. C.), 110 Fed. 717; coal supplied to a contractor and used to operate hoisting and pumping engines employed in the performance of a contract for the construction of a drydock: *City etc. Trust Co. v. United States*, 147 Fed. 155 (77 C. C. A. 397); drawings and patterns made for the contractor constructing a steam vessel for the United States, from which to make molds and castings; also towing in the delivery of materials, wharfage paid in connection with such delivery, and the local transfer or hauling of materials: *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24 (55 L. Ed. 72, 31 Sup. Ct. Rep. 140); use of equipment in the erection of a naval training station: *United States v. Illinois Surety Co.*, 226 Fed. 653 (141 C. C. A. 409).

In the instant case F. A. Hadley, the subcontractor, testified in part as follows:

“A. I had about between eight and nine miles of work on the Columbia Highway, subcontracted or as a station man.

“Q. Now, what were your duties by way of that subcontract with Peterson and Johnson?

“A. To grade a certain portion of the Columbia Highway.

“Q. Now, how many men did you employ on the average on the work there?

“A. I couldn’t say as to how many, my payroll would show, I suppose all the way from thirty-five to as high as one hundred.

“Mr. Veness: How did you provide for the feeding of the men?

“A. With a boarding camp.

“Q. What is the necessity of a boarding camp around camps of that kind?

“A. Well, I don’t know how you would keep a bunch of men together out there in the woods unless you run a boarding-house to feed them or to hold them there.
* * ”

The court remarked:

“But the mere incident of the running of the boarding-house where the men are bound to lose more or less time by reason of inclement weather or other conditions, the boarding-house goes on just the same, the crew is kept together just the same, is kept together for the purpose of carrying out that contract, and they have to be fed while they are kept together, and even though he charged them for their board at that time and didn’t pay their wages, it would be the board of the men and a part of that work, as the furnishing of supplies is a part of that work. I am not passing on that yet, but as far as keeping the establishment open, that is one of the essentials of the business.”

Witness Hadley further stated, in effect, that the meat supplied by Frye & Company to him was all used in boarding the men; that there was no other known place for them to eat; that occasionally one of the engineers on about twenty-eight miles of the road who boarded at Astoria, four and one-half miles away from Hadley’s camp, and usually brought their lunch, would come in and get a meal and no charge was made therefor; and that one of the employees had a visitor for about two days.

The fact that a small courtesy was shown to an occasional guest in a sparsely settled civilized section of

the country we deem of no importance, although much is attempted to be made thereof in defendants' brief.

3. Plaintiff requested the court to find, among other things:

"That it was necessary for the prosecution of the work in question that said Hadley maintain a boarding camp at each of his construction camps, in order that the laborers could have a place convenient to said work to be fed, and except for the maintenance of such boarding camps, said Hadley would have been unable to keep said laborers together and at work upon said job; each of said construction camps being necessarily a long distance from any place where board could be secured by said laborers."

Error is assigned upon the refusal of the court to find as requested. The uncontradicted testimony supports the requested finding, and, if the finding made was not intended to be to the same effect, we think the substance of the request should have been embraced in the portrayal of facts. There is no evidence in the case supporting any different finding in this respect.

The meat furnished by the use plaintiff for food for the laborers, under the circumstances of the case, was absolutely necessary in any prosecution of the work provided for in the contract. It was supplied upon the faith and credit of the bond sued on, and is protected thereby. It facilitated the work to have the laborers take their meals in camp near the construction, instead of traveling a long distance for them. The camp arrangement was practically the only way the work could have been successfully prosecuted.

We suppose it would be conceded that if the act under consideration enumerated "supplies, labor, or materials," that meat so furnished workmen would be protected by the statute. If the statute read, "all persons supplying * * supplies, labor or materials"

the word "supplies" would practically be a repetition and would not add to the force of the law. For good measure we quote from the note in 27 L. R. A. (N. S.) at page 601:

"The courts that have construed contractor's bonds to public or *quasi*-public corporations and officers, conditioned upon the payment of laborers and materialmen, as valid contracts, both of indemnity to the nominal obligees and guaranties to the unnamed beneficiaries, upon which the latter can recover, when taken without explicit and direct authority from any statute—and they greatly outnumber the tribunals which hold the opposite view—are by no means united upon the grounds of their conclusions. Some hold that the power to take such a bond is an incident to the power to construct the public work by contract, and that statutory authority for the latter is, by implication, statutory authority for the former. Others hold statutory authority unnecessary, and the bond a common-law obligation, voluntarily executed, such as any obligee may take, and the taking of which is warranted upon broad grounds of public policy. It is not at all necessary to decide upon the merits of these respective theories; suffice it to say that the weight of authority appears to be that when the language of a bond is sufficiently precise and full to create an explicit obligation to pay laborers and materialmen, then, for either the one or the other reason, it is valid, and enforceable at the suit of the beneficiaries."

The same principle is announced in several Oregon precedents: See *The Home v. Selling*, 91 Or. 428, 435 (179 Pac. 261), and cases there cited. See, also, 13 C. J. 705, Section 815, where a wealth of authorities are cited; annotation, L. R. A. 1917B, 1015.

The trial court erred in its conclusion of law to the effect that the meats furnished by Frye & Company did not come within the provisions of Section 6266, L. O. L., as amended by Chapter 27 of the Laws of 1913,

and that the plaintiff was not entitled to recover from any of the defendants except F. A. Hadley. The judgment of the lower court will therefore be reversed.

The whole of the testimony in the case is contained in the record, which is complete. From the findings of fact made by the trial court, taken in the light of the undisputed testimony, the plaintiff is entitled to a judgment against the respondents as prayed for in the complaint, which will be entered: Article VII, Section 3, Constitution of Oregon.

REVERSED. JUDGMENT RENDERED.

Argued December 31, 1919, reversed and dismissed February 24, former opinion modified and rehearing denied April 13, 1920.

BURR v. MUTUAL LIFE INS. CO.

(187 Pac. 850; 188 Pac. 962.)

Insurance—Payment of Cash Surrender Value of Policy upon False Affidavit as to Death of Beneficiaries to Whom Paid-up Policy had been Issued Held Ineffective to Invalidate Paid-up Policy.

1. Where insurer issued paid-up policy, stipulating that the consideration had been paid by beneficiaries, and agreeing to pay to beneficiaries specified amount upon death of insured, and where insured subsequently delivered policy to insurer upon receipt of the cash surrender value of the policy, upon insured's false affidavit that the beneficiaries were dead, the transaction was ineffective to surrender or cancel the policy.

Insurance—Equity will not Revive Policy Wrongfully Surrendered to Insurer, Remedy at Law Being Adequate.

2. Where insurer issued paid-up policy, stipulating that the consideration had been paid by beneficiaries, and agreeing to pay specified amount upon death of insured, and where insured subsequently delivered policy to insurer upon receipt of the cash value of the policy, upon insured's false affidavit that the beneficiaries were dead, equity had no jurisdiction of suit to restore and revive the policy, since the transaction did not operate to surrender or cancel the policy, and since, the policy being in force, the beneficiaries had a complete and adequate remedy at law.

ON PETITION FOR REHEARING.

Appeal and Error—Court Reversing Judgment in Equitable Action Triable at Law will Remand Case for Trial.

3. In beneficiary's action in equity to revive and restore canceled policy and to recover thereon, Supreme Court, in reversing judgment for beneficiary on ground that beneficiary's remedy was an action at law, will remand cause under Laws of 1917, page 126, so that beneficiary may have case tried at law, with permission to beneficiary to amend her pleadings.

From Multnomah: ROBERT TUCKER, Judge.

Department 2.

The defendant is a life insurance corporation organized under the laws of the State of New York and is now doing business in the State of Oregon. The plaintiff is a resident of this state, the daughter of Peter A. Josephs, now deceased, and the sister of James and John E. Josephs, who are residents of California.

On June 16, 1868, the defendant issued its policy on the life of Peter A. Josephs for \$5,000, payable to his said children. This policy was conditioned upon the payment of the stipulated premiums, and in 1871, for failure to pay them, it was surrendered. The defendant then issued its paid-up policy No. 123,654, for the sum of \$400, payable to James and John E. Josephs and this plaintiff. The face of the policy reads in part as follows:

“The Mutual Life Insurance Company of New York in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and forty dollars and fifty cents, to them duly paid by James, Harriett and John E. Josephs, children of Peter A. Josephs, do insure the life of the said Peter A. Josephs of St. Joseph in the county of Buchanan, State of Missouri, in the amount of four hundred dollars, for the term of his natural life. And the said Company do hereby promise and agree to pay the amount of the said insurance at their office in the

city of New York, to the assured, their executors, administrators or assigns, in sixty days after due notice and proof of the death of the said person whose life is hereby insured."

On August 6, 1888, this policy was delivered by the insured, Peter A. Josephs, to the defendant, without the knowledge or consent of either of the beneficiaries. It was accompanied by his affidavit to the effect that the beneficiaries were then all dead and had died in their infancy. Without investigation and accepting this as true, the defendant at that time paid the insured the sum of \$183, then the cash value of the policy, in consideration of which the document was surrendered to the defendant.

On December 24, 1895, Peter A. Josephs died in the State of New York, where he was in business after moving from California, and an administrator of his estate was appointed there. James and John E. Josephs were then residents of California, and the plaintiff, of the State of Oregon. After the death of their father they at once instituted a vigorous search for the original \$5,000 policy which the deceased had shown to the plaintiff when she was a child. The testimony is conclusive that she did not know the name of the insurance company which issued the policy or any of the terms or conditions thereof except that with her brothers she was named as a beneficiary. Although diligent search was made and numerous letters were written, no one was found who knew of the actual existence of such a policy, or the name of the company which had issued the \$5,000 policy which was shown to the plaintiff by her father. The plaintiff employed a Portland attorney to assist her in locating the policy, but without success. Finally she went to Mr. Samuels, a prominent insurance man of Portland, to whom she

related the facts and from whom she obtained a list of all the insurance companies doing business in the United States in 1868, some 32 in number. She then addressed a circular letter of inquiry to each one of them and in answer to the letter which she wrote the defendant she learned for the first time that the \$5,000 policy had been surrendered and in lieu thereof a paid-up cash policy of \$400 was issued and that based upon the false affidavit of her father to the effect that the beneficiaries therein, his children, had all died in infancy, the company paid to him \$183, in consideration of which he delivered to the defendant the \$400 paid-up policy, and for such reason the defendant denied all liability thereon.

The plaintiff then for the first time furnished "due notice and proof of the death of the said person whose life" was thereby insured, and for failure of the defendant to pay the amount of the policy, the plaintiff brought this suit, alleging all of the facts above set forth. She prays for a decree restoring and reviving the policy and for the sum of \$400, with interest from December 24, 1895, at the rate of 6 per cent per annum, as well as such other and further relief as to the court may seem equitable.

To this complaint the defendant filed a demurrer on the following grounds:

"(1) Said complaint shows on its face that plaintiff is pursuing a stale demand.

"(2) More than six years have elapsed since the accrual of the cause of action stated in said complaint, as appears from the face of said complaint.

"(3) Said complaint fails to state facts sufficient to constitute a cause of suit.

"(4) Said complaint shows on its face that the cause of suit herein alleged is barred by laches."

After argument the demurrer was overruled. The defendant then answered, admitting the issuance of the \$5,000 policy in 1868, the surrender thereof, and the issuance of the \$400 paid-up policy in 1871, and alleging that the latter policy was surrendered on August 6, 1888, by the insured, upon his said affidavit and the payment to him of \$183, by reason of which the defendant denies all liability. As a further and separate answer it is pleaded that the plaintiff is pursuing a stale claim; that it is barred by the statute of limitations of the State of California, and that of the State of Oregon. The defendant prayed to be discharged.

After the plaintiff filed a reply, testimony was taken and a decree was rendered in favor of the plaintiff for \$400, the face value of the policy. The defendant appeals, contending that the court erred: First, in decreeing that the policy is a valid, existing contract; second, in holding that the surrender and cancellation thereof were void; third, in rendering a decree in favor of the plaintiff; and fourth, in not giving a decree in favor of the defendant.

REVERSED AND DISMISSED.

For appellant there was a brief over the name of *Messrs. Snow, Bronaugh & Thompson*, with an oral argument by *Mr. Earl C. Bronaugh*.

For respondent there was a brief over the names of *Mr. Omar C. Spencer* and *Messrs. Carey & Kerr*, with an oral argument by *Mr. Spencer*.

JOHNS, J.—The policy in question specifically recites that, in consideration of \$140.50 “duly paid by James, Harriett and John E. Josephs, children of said Peter A. Josephs,” the company insured the life of the said Peter A. Josephs in the sum of \$400. Thus

it is stipulated and agreed that the consideration of the policy was paid by the plaintiff and her brothers. By its terms the policy was fully paid up and the amount named was to be turned over to James, Harriett and John E. Josephs on the death of their father, Peter A. Josephs. There is no provision by which the \$400 or any part of it should be paid at any time to anyone else.

1. The affidavit which the father executed as to the death of his children was false; yet, based upon that declaration and relying thereon, the defendant paid to the father \$183, on receipt of which he delivered the policy to the company. That proceeding was null and void. The named children were then and are now living. Under such a state of facts the payment to the father would not and could not operate to surrender or cancel the policy. The beneficiaries never knew the actual facts until the plaintiff received the defendant's answer to her circular letter of September 23, 1915. On receipt of that communication from the plaintiff, the defendant promptly advised her of all of the facts. There is no testimony tending to show that the defendant ever refused her any information, sought to mislead her or to conceal any fact which would necessitate a bill of discovery or founded upon which a suit could be sustained.

By the express terms of the policy the company promised and agreed "to pay the amount of the said insurance at their office in the City of New York, to the assured, their executors, administrators or assigns, in sixty days after due notice and proof of the death of the said person whose life is hereby insured." This was a direct obligation on the part of the defendant, for a valuable consideration, to pay the \$400 to the

children of Peter A. Josephs upon his death. To obtain the payment of this amount the beneficiaries had a complete and adequate remedy at law; and in any action therefor the payment to the father would not constitute a defense. That whole transaction was void. The policy was not surrendered and could not be canceled thereby, and the company could not thus acquire title to it.

2. In the instant case the defendant filed a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of suit, and it has relied upon that demurrer in the Circuit Court and in the brief and argument in this court. As the plaintiff had a complete and adequate remedy at law, a court of equity does not have jurisdiction of this cause, and the demurrer should have been sustained. The decree is reversed and the complaint is dismissed without prejudice.

REVERSED AND DISMISSED.

McBRIDE, C. J., and BENNETT, J., concur.

BEAN, J., Dissenting.—It is contended by counsel for defendant that a suit in equity cannot be maintained by plaintiff, but that the remedy was by an action at law after the death of the insured and within the time prescribed by the statute of limitations.

The policy of insurance in question was wrongfully surrendered by the insured, and canceled by the insurer without right or authority, and without the knowledge or consent of the beneficiaries, and a suit in equity can be maintained to set aside the surrender and cancellation of the policy and revive or reinstate the instrument and recover thereon: 14 R. C. L., p. 1014, § 193; 25 Cyc. 792; 14 Standard Ency. of Procedure, 15; *Mausbach v. Metropolitan Life Ins. Co.*, 53 How. Pr.

(N. Y.) 496; *Cohen v. New York Mutual Life Ins. Co.*, 50 N. Y. 610 (10 Am. Rep. 522); *Whitehead v. New York Life Ins. Co.*, 63 How. Pr. (N. Y.) 394; *Id.*, 33 Hun (N. Y.), 425; *Id.*, 102 N. Y. 143 (6 N. E. 267, 55 Am. Rep. 787); *Stilwell v. Mutual Life Ins. Co. of N. Y.*, 72 N. Y. 385; *Tabor v. Michigan Mutual Life Ins. Co.*, 44 Mich. 324 (6 N. W. 830).

In case of a wrongful repudiation of a policy of insurance by the insurer an option is given to the insured, or beneficiary having a vested interest therein, to pursue different remedies, but the right to say what course shall be pursued is not awarded to the company issuing the policy, which has wrongfully canceled such policy and denied its liability thereon, and obtained a receipt from the insured indorsed on the policy.

The rule is stated in 25 Cyc. 792 thus:

“REMEDIES FOR WRONGFUL SURRENDER, CANCELLATION, OR TERMINATION OF CONTRACT—a. Action to Set Aside Cancellation or Surrender. A suit in equity may be maintained by the insured or the beneficiary, according to the circumstances, to set aside a surrender and cancellation of a policy and revive or reinstate the same, and to recover what may be due thereon, where the surrender and cancellation was procured by fraud on the part of the company or its agent, * * or where the surrender was wrongfully made by the insured without the assent of the beneficiary * * .”

See *Day v. Connecticut Gen. L. Ins. Co.*, 45 Conn. 480 (29 Am. Rep. 693); *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516 (29 Am. Rep. 200); *Hayner v. American Popular L. Ins. Co.*, 69 N. Y. 435; *Union Cent. L. Ins. Co. v. Poettker*, 5 Ohio Dec. (Reprint) 263 (4 Am. Law Rec. 109). In 14 Standard Encyclopedia of Procedure, page 15, the author states:

“Where an unauthorized surrender of a policy of life insurance operates as a fraud upon the beneficiary, equity will decree a revival and enforcement of the original policy.”

It is insisted on behalf of the defendant company, that the remedy of the plaintiff, if any, is at law. It does not fill the complement to say there is a remedy at law. Such legal remedy, both in respect to the relief to be finally obtained, and the manner of obtaining it, must be as practical and efficient as the relief which a suit in equity would afford under like circumstances, or the jurisdiction in equity may be exercised: *South Portland Lbr. Co. v. Munger*, 36 Or. 457, at page 473 (60 Pac. 5, at page 8), Mr. Justice WOLVERTON says:

“The remedy at law to which the statute alludes must be plain, adequate, and complete, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. It is not enough that there is a remedy at law: *Boyce's Exrs. v. Grundy*, 28 U. S. (3 Pet.) 210 (7 L. Ed. 655). Mr. Chief Justice FULLER, in *Gormley v. Clark*, 134 U. S. 338, 349 (33 L. Ed. 909, 914, 10 Sup. Ct. Rep. 554, 557), states the doctrine thus: ‘The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances.’ See, also, *Kilbourn v. Sunderland*, 130 U. S. 505, 514 (32 L. Ed. 1005, 9 Sup. Ct. Rep. 594); *Watson v. Sutherland*, 72 U. S. (5 Wall.) 74, 18 L. Ed. 580; *Witter v. Arnett*, 8 Ark. 57.. In *Henderson v. Johns*, 13 Colo. 280 (22 Pac. 461), it is said: ‘The remedy at law which defeats a suit in equity must be full, adequate, and complete. Anything less than this will not be sufficient to deprive equity of jurisdiction.’ And again, in 11 Am. & Eng. Ency. Law (2 ed.), 200, the learned author says: ‘The construction given to this phrase “adequate remedy” by the courts requires that the remedy at law must be as

practical and efficient as the remedy afforded by chancery, in order to exclude the latter from jurisdiction.' "

See *Hall v. Dunn*, 52 Or. 475 (97 Pac. 811, 25 L. R. A. (N. S.) 193).

Defendant in its answer admits—

"That on August 6, 1888, the said Peter A. Josephs made and executed an affidavit before a notary public in the city, county and State of New York stating that James, Harriett and John E. Josephs, children of said Peter A. Josephs, were all dead, having died in infancy, and that said affidavit was thereafter by the said Peter A. Josephs filed with defendant, and thereupon, on August 9, 1888, said paid-up policy numbered 123,654, for \$400.00 was returned by the said Peter A. Josephs to defendant, and defendant thereupon paid to the said Peter A. Josephs the sum of \$183, being the full surrender value of said policy."

In effect, the defendant asserts that the policy was paid and is dead, and asks that the question of restoring it to life be submitted to a court of law and tried by a jury. In the view of the writer such a trial before a jury would be a very inefficient and ineffectual remedy.

After the present suit has been determined and the cancellation of the policy declared "null and void" according to the majority opinion, the plaintiff might be in a better position. Until then, the defendant having possession of the receipted policy, the plaintiff would be in a crippled condition for a legal battle.

While it may be true that the defendant company never intentionally concealed any fact from the beneficiaries, the natural result of the wrongful cancellation of the policy served to obliterate it or hide the same from them for a period of about twenty years. On account of this the defendant asserts that the plaintiff is guilty of laches and cannot recover. The plain-

tiff is not barred by laches: 1 Pomeroy Eq. Juris. (4 ed.), §§ 419, 424; 5 Pomeroy Eq. Juris. (4 ed.), §§ 26, 35.

According to the terms of the contract, the cause of action accrued sixty days after proof of death. The limitation fixed by the statute for enforcing payment had not expired when this suit was instituted.

It may as well be said that the insurance company should have consulted the beneficiaries before attempting to cancel the policy, and that it could easily have found out that they were alive, as to say that the beneficiaries should have consulted the records of insurance of the whole world and found the hidden policy in the possession of the defendant company. The company had the names of the beneficiaries and could easily have written to or about them. The beneficiaries did not know the name of the insurer. It was not through their fault that the policy slumbered in its grave for years, but owing to the active wrong of the company, although not intentional, in canceling the policy at the request of one who had no authority or right to make the same, and that without making any investigation as to the existence of the persons interested whose names it had written in the policy. Such conduct on the part of the company operated as a fraud upon those entitled to the benefit of the policy. An insured person who is not always familiar with the intricate requirements of a policy of insurance is usually deemed to know the terms of a policy, and although the affidavit showed the reverse, it would not seem to be too strict a rule to require an insurer to observe the main contents of a policy which it has issued. If the company had read the policy, it would have observed that the beneficiaries could not have

died in early infancy, and 1 per cent of the effort put forth by plaintiff would have disclosed to the company that the beneficiaries were very much alive. The effect of the attempted cancellation evidently was to mislead the beneficiaries and prevent them from asserting their rights for about twenty years. As soon as they had knowledge of the situation, they acted promptly and commenced suit. It does not appear that the beneficiaries were guilty of laches or inexcusable delay. They were not at fault in this respect. In 5 Pomeroy's Eq. Juris. (3 ed.), Section 26, it is stated:

"A person cannot be deprived of his remedy in equity on the ground of laches unless it appears that he had knowledge of his rights, as one cannot acquiesce in the performance of an act of which he is ignorant, so that one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting always that his want of knowledge is not the result of his own culpable negligence."

In Section 35, the same author says:

"It has been held that, where the party interposing the defense of laches has contributed to or caused the delay, he cannot take advantage of it."

As said in *Cohen v. New York Mutual Life Ins. Co.*, 50 N. Y. 610 (10 Am. Rep. 522):

"Courts of equity depart from the ordinary rules by which their jurisdiction is hedged in, in order to do equity between suitors, and whether a proper case is made for the exercise of the equitable powers of the court, necessarily depends upon the circumstances."

The circumstances of the present case are peculiar and present strong reasons why a court of equity should lend its aid. By reference to the letter of October 5, 1915, in response to the letter of September 23d

from Mrs. Burr, we find a statement of the insurance company that, "The second policy was surrendered to the company for cash in 1888," and the letter further states that if these policies were actually on the life of the father, "you will see that they are of no value." So that, not having possession of the policy, it was necessary, in the face of the statement that there was no value to the beneficiaries in this policy, to get possession of the writing and the record and the lost instrument, to the end and for the purpose of reviving and establishing the policy in full force, and this could only be determined at the filing of complaint in equity, which was done; and, the court having assumed jurisdiction because the writing was not at hand, it is proper to retain jurisdiction for the purpose of working out the remedies which in good conscience ought to be administered.

By its letter the insurance company claimed the benefit of the payment and cancellation of the policy which it had negligently made, and denied responsibility upon its written contract for which it had been paid to protect, in a measure, fatherless children from want. The position it thereby assumed was at least analogous to that of a sacred trust. I doubt if the company really wishes to be recreant to its duty, if it sees such duty.

It is stated in the majority opinion that there is no showing that defendant "sought to mislead" plaintiff. The company, however, represented to plaintiff that the policy was valueless, and thereby endeavored to silence the beneficiaries for another long period, and adopted the fraud of the insured, and claimed the benefit of the long interment of the policy caused by its negligence: See *Tabor v. Michigan Mutual Life*

Ins. Co., 44 Mich. 324 (6 N. W. 830). The decree of the lower court should be affirmed.

For these reasons I am impelled to withhold my assent to the conclusion reached in the opinion of Mr. Justice JOHNS.

Modified and rehearing denied April 13, 1920.

PETITION FOR REHEARING.

(188 Pac. 962.)

Department 2.

On petition for rehearing, former opinion modified and rehearing denied.

MODIFIED. REHEARING DENIED.

Messrs. Carey & Kerr and Mr. Omar C. Spencer, for the petition.

Messrs. Snow, Bronaugh & Thompson, contra.

JOHNS, J.—In answer to the petition for rehearing, there is one feature of the former opinion which should be corrected. The complaint was founded upon the policy of life insurance, and there is no allegation or proof that the defendant was ever asked, or that it refused, to furnish a copy of the original policy or to give any information concerning it. Under the provisions of Chapter 95, Laws of 1917, the plaintiff is entitled to have the cause remanded, to file an amended complaint, and to have her case tried as an action at law. The former opinion will be modified,

with leave to the plaintiff to apply to the Circuit Court so to amend her pleadings.

The petition for rehearing is denied.

FORMER OPINION MODIFIED AND REHEARING DENIED.

McBRIDE, C. J., and BENNETT, J., concur.

BEAN, J., dissents.

Argued March 4, affirmed April 13, 1920.

CHASE v. LA MOREE.

(188 Pac. 959.)

Banks and Banking—Evidence Held to Show Payment of Debt Collaterally Secured.

1. Evidence *held* to show that a debt to a bank, to secure which a mortgage and note were given by the holder, a third party, to the bank, had been paid, so that the right to the note and mortgage reverted in the original holder thereof, as against assignee of one to whom bank had returned them.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

This is a suit to foreclose a mortgage upon real estate. The complaint is in the usual form, the plaintiff being the assignee of the instruments upon which the suit is based. The defendants answered, declaring their readiness to pay the note secured by the mortgage, and brought the money into court, alleging that Michler, the payee named in the note and mortgage, claimed that they were still his property, and asked that Michler be made a defendant, and thereafter, pursuant to an order of the court, Michler filed his answer and cross-complaint, to which a reply was filed, and a

trial had, resulting in a decree in favor of defendant Michler, from which plaintiff appeals. The facts are set out in the opinion. **AFFIRMED.**

For appellant there was a brief over the name of *Messrs. Platt & Platt*, with an oral argument by *Mr. H. G. Platt*.

For respondent there was a brief and an oral argument by *Mr. Maurice W. Seitz*.

BENSON, J.—1. Upon the deposit of the money with the clerk of the trial court, the suit was dismissed as to the defendant La Moree, and proceeded between plaintiff and defendant Michler for the purpose of determining to which of them the money should be awarded. The problem presented is simply a question of fact. The evidence is somewhat conflicting and in many respects unsatisfactory, but a careful investigation of the record convinces us that the following details are established by a preponderance of the evidence. E. H. Corbett was indebted to the Lumbermen's National Bank of Portland, in the sum of \$1,750, with accrued interest, the debt being evidenced by two notes, one maturing September 17, 1910, and the other October 1, 1910. Upon the maturity of the second note, the bank demanded immediate payment, which Corbett was unable to make, and he asked for an extension of time thereon. This was agreed to by the bank, upon the condition that he should furnish security for their ultimate payment. Corbett had nothing which could serve as such security, and therefore he applied to his friend Michler to furnish the necessary collateral, saying that he was threatened by the bank with criminal prosecution for having misrepresented his financial circumstances, and Michler, to save his friend from im-

pending disgrace, and upon the assurance that Corbett's father, then living in Brooklyn, New York, would soon come to Portland for the purpose of paying his son's debt, and that the collateral would then be returned to its owner, delivered to Corbett the note in controversy, having indorsed it in blank. Corbett deposited the note with the bank as collateral, and a few days later, at the request of the bank, Michler executed to it an assignment of the mortgage security. Early in the month of May, following, C. H. Corbett, Sr., the father of E. H. Corbett, did come to Portland for the purpose of adjusting his son's financial affairs. The son explained fully to his father the terms and conditions under which the La Moree note and mortgage had been hypothecated. C. H. Corbett, Sr., paid to the bank the sum due upon the two notes of E. H. Corbett, and after they had been indorsed by the bank without recourse, he gave them to his son, who tore off his signature and kept the canceled paper. The father also paid several other of his son's obligations, and exacted from the son a new note covering all of such payments, the face of the new note being \$4,567.16. When the father handed to his son the two notes above mentioned, the latter reminded the father that the La Moree notes were owned by Michler, and asked permission to return them to the owner, but the father said that he would himself return them. However, they were never returned, and C. H. Corbett, Sr., went back to Brooklyn, and, so far as the record discloses, never made any effort to collect either the new note exacted from his son, or the La Moree note, although the latter matured on September 1, 1912, and nothing occurs in regard to either of them until after the death of C. H. Corbett, Sr., the exact date of which does not appear, although it does appear that C. H. Corbett, Jr., became an executor of

the father's estate in March or April, 1918, and discovered the La Moree note and mortgage among his father's papers, and he and his coexecutrix assigned the collateral note and mortgage to the plaintiff on April 29, 1918, nearly six years after maturity, and the son's note for \$4,567.16, which plaintiff contends was secured, *pro tanto*, by the La Moree note, was not assigned with the collateral. E. H. Corbett, the original debtor, upon cross-examination, was asked this question:

"State whether or not it is a fact that at the time you gave the new note to your father, he retained the La Moree note and mortgage as security for that portion of the new note which represented the two notes above mentioned for \$250 and \$1,500, respectively, and at the same time you gave to your father other and additional security for the balance of the new note?"

To which he replied:

"He did not keep the La Moree note and mortgage as security for any portion of my note to him, nor did he get any other security or collateral from me to secure the note I gave him. My father stated to me that he gave me this money as an advancement from his estate, as he considered that he had given other members of the family their share at the time of their marriage in the nature of a dowry, and inasmuch as I needed the money then, he would make me the advancement."

After a consideration of the evidence we think the trial court was fully justified in finding that the son's notes to the bank had been paid and canceled, and that neither the father nor his estate had any interest in the La Moree note, and, of course, the plaintiff could have no better claim by virtue of this assignment thereof. The decree is therefore affirmed. AFFIRMED.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

Motion to dismiss appeal submitted March 23, allowed April 13, 1920.

BAILLIE v. COLUMBIA GOLD MINING CO.

(188 Pac. 973.)

Appeal and Error—Order Directing Receiver to Pay Costs is not Appealable.

1. An order directing receiver to pay the costs previously adjudged against the defendants in the suit out of funds of defendant company then in the receiver's hands is an interlocutory order which is not appealable, but which can be reviewed, if at all, only after the final determination of the suit.

[As to the right of a receiver to appeal from a judgment respecting receivership, see note in *Ann Cas.* 1915D, 802.]

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

This is an appeal from an order of the court directing the receiver to pay the costs adjudged against the defendant, as indicated in the opinion in the former hearing of this cause, as reported in 86 Or. 1 (166 Pac. 965, 167 Pac. 1167). The mandate in said cause having been duly entered, the Circuit Court made an order directing the receiver theretofore appointed to pay the costs adjudged against defendants, amounting to \$413, out of the moneys of defendant company then in his hands and from this order defendant company appeals.

APPEAL DISMISSED.

Messrs. Smith & Smith, Mr. J. H. Nichols and Mr. J. L. Rand, for the motion.

Mr. M. D. Clifford and Mr. Harris Richardson, contra.

McBRIDE, C. J.—For the reasons stated in a former appeal, from an order requiring defendant to produce

its books (95 Or. 609, 188 Pac. 418), we hold that the order is not appealable. It is not a final order, which, in effect, determines the suit, but is a mere interlocutory order which must await the final determination of the suit before it can be reviewed here, if appealable at all: *Clay v. Clay*, 56 Or. 538 (108 Pac. 119, 109 Pac. 129).

The appeal is dismissed.

DISMISSED.

Argued February 19, reversed and dismissed April 13, 1920.

HOLMES v. OLCOTT, SECRETARY OF STATE.

(189 Pac. 202.)

Game—Commission Vested With Discretionary Power to Expend License Fees.

1. It was the evident intent of the legislature by Laws of 1915, Chapter 287, Section 11, paragraph "h," to invest the fish and game commission with a discretionary power to protect and propagate game within the state and to expend, subject to legislative approval, the money derived from fees and licenses.

States—Money cannot be Expended Without Appropriation Therefor.

2. The authority to make an appropriation of state moneys is vested exclusively in the legislature, and no commission or individual has any power whatever to expend the public moneys without a legislative appropriation therefor, in view of Article IX, Section 4, of the Constitution.

States—Appropriation of Public Moneys Held Sufficiently Definite and Certain.

3. The moneys and license fees appropriated by Laws of 1915, Chapter 287, and Laws of 1915, Chapter 257, Section 3, as amended by Laws of 1917, Chapter 243, Section 1, for the protection and propagation of game within the state, although no sum is specified, become definite and certain when the moneys are collected and turned in to the state treasurer, all of such sums paid in to be used for the purpose specified, and the appropriation of such moneys is sufficiently definite as to amount.

[As to the appropriation of public money within constitutional provision relating thereto, see note in *Ann. Cas.* 1915A, 1240.]

Constitutional Law—Vesting Fish and Game Commission With Authority to Expend Moneys Discretionary With Legislature.

4. Vesting the fish and game commission with authority to expend all moneys and license fees collected, as was done by Laws of 1915, Chapter 257, Section 3, as amended by Laws of 1917, Chapter 243, Section 1, was a matter within the discretion of the legislature, upon which the court has no right to express its views.

States—Statute a Continuing “Appropriation” of Moneys and License Fees for Protection of Game.

5. Laws of 1915, Chapter 257, Section 3, as amended by Laws of 1917, Chapter 243, Section 1, providing that moneys and license fees paid into the state treasury shall be considered as an appropriation, etc., is in the nature of a continuing “appropriation” of the amounts paid in, under Laws of 1915, Chapter 287, and is an “appropriation” made by law within the meaning of Article IX, Section 4 of the Constitution.

Game—Commission Empowered to Purchase Farm for Propagation of Chinese Pheasants.

6. The purchase of a farm for the propagation of Chinese pheasants is germane to and within the purview of Laws of 1915, Chapter 287, authorizing the fish and game commission to expend money for the protection and propagation of game, etc.

From Marion: GEORGE G. BINGHAM, Judge.

In Banc.

The plaintiff alleges that he—

“Is a resident and inhabitant of Multnomah County, State of Oregon, and a taxpayer in said state and county, and brings this suit in his own interest and in the interest of all other taxpayers in the State of Oregon to prevent the illegal disbursement of public funds, which he alleges to be true upon information and belief.”

That the defendant Ben Olcott is Secretary of State, and with the other defendants constitutes the state board of fish and game commissioners, of which he is *ex-officio* chairman; that the commission was created by virtue of Chapter 287, Laws of 1915; and that about July 3, 1919, the members thereof “authorized the purchase of a game farm in Lane County for the propagation of Chinese pheasants,” known as the Reddish

farm, at an agreed price of \$7,680, payable in installments from and out of the public funds in the hands of the defendant Hoff as state treasurer. The complaint states that on the date last mentioned the commission "approved the payment of a claim in the sum of \$2,000 as the first installment of the purchase price of said game farm"; that, as Secretary of State, the defendant Olcott threatens to and will audit said claim when it is presented and will draw his official warrant for the amount thereof on the defendant Hoff; that, unless restrained and enjoined, the defendant Hoff threatens to and will pay said warrant; and that the other members of the commission will approve further claims for the payment of the balance of the purchase price. It is next alleged that "under and by virtue of Chapter 287, Laws of 1915, all moneys collected for license fees for hunting and fishing are required to be deposited to the general funds of the State of Oregon," and for the reason that the legislature has not enacted any law authorizing the purchase of the farm or made any appropriation therefor, "the auditing of the said claim and the drawing of a warrant therefor by the defendant Secretary of State and the payment thereof by defendant state treasurer will be a withdrawal of said money from the state treasury in direct violation of Section 4 of Article IX of the Constitution of the State of Oregon"; that by the payment of such warrant "the funds of the State of Oregon will be dissipated and lost and plaintiff's burden of taxation will thereby be appreciably increased to his irreparable damage." The plaintiff prays for a decree enjoining the auditing and payment of the \$2,000 and the allowance of any further claims for the payment of the balance of the purchase price "and the cost of operation and maintenance of said game farm."

To this complaint the defendants filed a demurrer on the following grounds:

“That the plaintiff has not legal capacity to sue.

“That there is a defect of parties defendant for the reason that Frank E. Reddish, the vendor of the lands payment for which is sought to be enjoined by the plaintiff, is a necessary party to said suit.

“That said complaint fails to state facts sufficient to constitute a cause of suit against said defendants or any of them.”

This was overruled on September 3, 1919. The defendants elected to stand on their demurrer and on November 3d following, the court rendered a decree as prayed for in the complaint, enjoining the issuance and payment of said warrant. The defendants appeal, claiming that the court erred in not sustaining their demurrer and “in not giving and entering judgment and decree in favor of the defendants.”

REVERSED AND REMANDED.

For appellants there was a brief over the names of *Mr. George M. Brown*, Attorney General, and *Mr. Isaac H. Van Winkle*, Assistant Attorney General, with an oral argument by *Mr. Brown*.

For respondent there was a brief over the names of *Mr. William P. Lord* and *Mr. Arthur I. Moulton*, with an oral argument by *Mr. Lord*.

JOHNS, J.—Section 4 of Article IX of the Constitution provides:

“No money shall be drawn from the treasury but in pursuance of appropriations made by law.”

Section 7 of the same article is as follows:

“Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions upon no other subject.”

The decision of this case depends upon the construction of those sections.

Section 4 is historical and is identical with that of the federal Constitution and the organic law of numerous states. Such provisions are substantial copies of declaratory acts or resolutions of the British Parliament which were adopted when British subjects were claiming and asserting their rights. In the early government of England the king levied, collected and expended the public revenues. Through a series of reforms, after the revolution of 1688 it finally became a law that the king could not use the public money unless it was specially appropriated by an act of Parliament. The abuse to be corrected by the establishment of the principle was in the exercise of official discretion with regard to the expenditure of public money. The purpose to be accomplished was to impose upon the legislative power this duty and to give to it alone the right of specifying the particular demands against the state which should be paid from time to time out of public funds.

It will be noted that Section 4 of Article IX does not specify how an appropriation shall be made, or when it shall be made. Hence, those questions become important.

In the leading case of *Ristine v. State of Indiana*, 20 Ind. 328, the Supreme Court of that state said:

“Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the legislature given at the proper time, and in legal form, to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state.”

In 1 Words & Phrases, page 471, we find:

“ ‘Appropriation’ is the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other.

“To appropriate means to allot, assign, set apart, or apply to a particular use or purpose. An ‘appropriation,’ in the sense of the constitution, means the setting apart a portion of the public funds for a public purpose, and there must be money placed in the fund applicable to the designated purpose to constitute an appropriation.

“An ‘appropriation’ of money to a specific object is an authority to the proper officers to pay the money because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury.”

In *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88 (69 N. W. 373, 61 Am. St. Rep. 538), it is held:

“An appropriation, within the meaning of our Constitution, is the setting apart by law of a certain sum from the public revenue for a specified purpose, so that the executive officers are authorized to expend that sum, and no more, for that purpose, and no other.

“An appropriation is not specific if it leaves the amount to be expended to be limited only by the extent of claims which may regularly be made upon it by the recipients; the amount of those claims being uncertain.”

The opinion also quotes with approval the definition of “appropriation” in *Ristine v. State of Indiana*, 20 Ind. 328. In *Clayton v. Berry*, 27 Ark. 129, it is said that “appropriated by law” means the act of the legislature setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors. In

Humbert v. Dunn, 84 Cal. 57 (24 Pac. 111), the court said:

“Has the legislature fixed the amount of the claim, and designated its payment out of a certain fund? These are the only things necessary to the validity of the appropriation.”

In *People v. Brooks*, 16 Cal. 11, it is held:

“To an appropriation, within the meaning of the Constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid.”

Stratton v. Green, 45 Cal. 149, holds that by a “specific appropriation” is understood an act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand. This last definition is approved by the Supreme Court of Nevada in *State v. La Grave*, 23 Nev. 25 (41 Pac. 1075, 62 Am. St. Rep. 764). The opinion in *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88 (69 N. W. 373, 61 Am. St. Rep. 538), after quoting from these authorities, says:

“It will be observed that each of these definitions includes as one of its requisites certainty as to the amount appropriated.”

On another point of construction, Section 4 of Article IX of the Constitution was before this court in *Shattuck v. Kincaid*, 31 Or. 379, 380 (49 Pac. 758), where in a well-considered opinion by Mr. Justice WOLVERTON it is held:

“An ‘appropriation’ is a setting aside or designation of particular funds for the discharge of certain definite and specified obligations, and may relate to a fixed amount of liability or to one that is continuing.”

The following quotation is there made from the case of *Ristine v. State of Indiana*, 20 Ind. 328:

“An appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be * * an authority from the legislature, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the state.”

The opinion goes on to say:

“No particular expression or set form of words is requisite or necessary to the accomplishment of the purpose, and the appropriation may be prospective as well as *in praesenti*; that is, ‘it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues’: *Humbert v. Dunn*, 84 Cal. 57 (24 Pac. 111); *Proll v. Dunn*, 80 Cal. 220 (22 Pac. 143). And in every instance it becomes a question of legislative intent to be gathered under the settled rules of interpretation from the language employed, the context, the necessity for the enactment, and purpose to be accomplished, considered in the light of contemporaneous circumstances.”

In the instant case the defendants contend that the legislature did make an appropriation by law.

Section 1 of Chapter 287, Laws of 1915, creates the board of fish and game commissioners and provides for the appointment of members, and its organization. Section 3 of the act is as follows:

“Said state board of fish and game commissioners or a majority thereof, shall have full power and authority to enforce all laws of the State of Oregon respecting for the protection, preservation and propagation of fish, game animals, game and nongame birds within the state. They shall have the exclusive power to expend for the protection, preservation or propagation of fish and game, all funds of the State of Oregon acquired for the protection, preservation or propagation of fish and game arising from state appropriations, licenses, gifts or otherwise; * * Said state board of fish and

game commissioners shall have full power and authority to use so much of the state funds as may be necessary for the acquisition of lands, water rights and easements, and other property; and for the construction, maintenance, operation and repair of fish hatcheries and other means and appliances for the protection and propagation of fish and game in the State of Oregon. * * ”

Paragraph “G” of Section 11 of the act reads in part thus:

“All moneys collected by the county clerk shall, on the last day of every month, be forwarded to the state treasurer, who shall deposit such amounts in the general fund and credit the same to the protective game fund account, and the state treasurer shall keep a separate and distinct account of all such moneys so received under the title of the game protective account, and shall at any and all times pay any and all warrants drawn and issued under the directions of the state board of fish and game commissioners as herein provided, after the same shall have been duly audited by the Secretary of State as herein provided, to the full amount of the money so credited to said game protective fund account, and in no instance shall the said state board of fish and game commissioners issue warrants in excess of the amount then and there credited to the said game protective fund account. * * ”

Paragraph “H” thereof provides:

“All moneys credited to the game protective fund account shall be used for the protection and propagation of game and game fish within the State of Oregon, under the direction of the state board of fish and game commissioners and under the administrative control of the state game warden or such other officer or officers as may be vested with the authority to enforce the laws of this state for the protection and propagation of game and game fish, and for the protection and propagation of game animals, game birds, nongame birds and game fish within the State of Oregon.”

Chapter 257, Laws of 1915, as amended by Chapter 243, Laws of 1917, was enacted to provide a more simple method of bookkeeping with respect to the special funds in the state treasury. Sections 1 and 2 of that act provide for the turning of numerous special funds into the general fund, and Section 3 enacts:

“Where any law provides that the proceeds arising from the levy and collection of any millage tax or from any license or other fee exacted by law, or that the moneys derived from any source whatever other than those excepted in Section 1 of this act, shall be paid into the state treasury and by the state treasurer placed to the credit of a special fund other than the general fund to be used for carrying out the provisions of the particular statute creating and authorizing the same, or for any other purpose which may be authorized by law, the amount of any such payment or payments so made into the state treasury, and the amount of any mileage tax levy, shall constitute and be considered as and are hereby made an appropriation of such sums or amounts from the general fund of the state, for the purpose of carrying into full force and effect the specific provisions of the particular law exacting the payment of the same and providing for the payment thereof into the state treasury, and in the same manner and to the same extent as therein provided. * * ”

The defendants contend that in legal effect and within the meaning of Section 4 of Article IX of the Constitution, this Section 3 is an appropriation to the use and benefit of the fish and game commission of any and all moneys derived from the payment of hunting and angling license fees and fines under Section 11 of Chapter 287, Laws of 1915.

1. It must be conceded that such fees and fines when collected are to be paid to the state treasurer, who shall place them in the general fund under the title of the “Game Protective Fund Account,” and it is made

his duty to pay all warrants drawn on such fund by the authority of the fish and game commission, after the same shall have been duly audited by the Secretary of State, to the full amount of that fund. The law expressly provides that the commission shall not issue any warrants in excess of "the amount then and there credited to the said game protective fund account."

Paragraph "H" of Section 11, Chapter 287, Laws of 1915, requires that all such moneys shall be used for the protection and propagation of game birds and game fish under the direction of the commission, "and for the protection and propagation of game animals, game birds, nongame birds and game fish within the State of Oregon." It was the evident purpose and intent of the legislature to invest the commission with a discretionary power for the protection and propagation of game within the state, and that the money derived from such fees and licenses, subject to the approval of the legislature should be expended by the commission.

2. The authority to make an appropriation is vested exclusively in the legislature, and no commission or individual has any power whatever to expend public money without a legislative appropriation therefor. But Section 3 of Chapter 243, Laws of 1917, specifically enacts that—

"The amount of any such payment or payments so made into the state treasury, and the amount of any millage tax levy, shall constitute and be considered as and are hereby made an appropriation of such sums or amounts from the general fund of the state, for the purpose of carrying into full force and effect the specific provisions of the particular law exacting the payment of the same."

Chapter 287, Laws of 1915, provides for the payment of hunting and angling license fees which shall

thereafter be placed to the credit of the "Game Protective Fund Account" by the state treasurer and for the drawing of warrants upon that fund by the commission when the same have been audited by the Secretary of State. The complaint alleges that "the members of the state board authorized the purchasing of a game farm in Lane County for the propagation of Chinese pheasants" and avers the employment of a caretaker and the payment of operating costs of the farm; in other words, it appears upon the face of that pleading that the money in question is to be expended for the protection and propagation of game birds within the state. There is no allegation of any fraud in the transaction or that the price is unreasonable.

3. Although according to the weight of authority the amount of an appropriation must be definite and certain, and the sum is not specified in the act in question, it becomes definite and certain when the moneys from such sources are collected and turned in to the state treasurer. All of such revenues shall be appropriated, under the terms of the statute. That is the effect of the decision in *State v. Moore*, 50 Neb. 88, 98 (69 N. W. 377, 61 Am. St. Rep. 538), where it is said:

"An appropriation may be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue."

In *People v. Miner*, 46 Ill. 384, on the same question it was held:

"There is no force in the objection that the appropriation is for no certain amount. * * It is not essential or vital * * that it should be an amount certain and ascertained prior to the appropriation."

On the same point in *State v. Searle*, 79 Neb. 111, 117 (112 N. W. 380, 382), the opinion says:

“No matter what the valuation of the grand assessment-roll may be, the rate of taxation is fixed, and it is merely a question of computation to determine what the tax will yield.”

This doctrine is founded upon the maxim, “*Id certum est quod certum reddi potest.*” So, in the instant case, when collected and paid over to the state treasurer, the amount of the license fees is annually made definite and certain.

Assuming that the act of 1917 is an appropriation within the meaning of Section 4 of Article IX of the Constitution, should it be construed as a continuing appropriation, and, if so, for how long? And did the legislative assembly of 1917 have authority to make an appropriation of such funds for the year 1919? Those are the vital questions. It is a matter of common knowledge that Congress has made a large number of continuing appropriations under the identical provision in the federal Constitution. In Section 4 of Article IX of our organic law there is no limit upon the time for which an appropriation may be made. In 36 Cyc., page 893, we find:

“In the absence of a constitutional prohibition, the legislature may make continuing appropriations; that is, those the payment of which is to be continued beyond the term or session of the legislature by which they are made. But in several states the Constitutions provide that no appropriations shall continue in force longer than for a designated period. Even under such a provision, however, unless expressly so provided, it is not necessary that the money appropriated should be actually drawn from the treasury during the time limited, although the expense must be incurred or the claim arise during such period.”

Under a constitutional provision identical with our own, the Supreme Court of California, in an exhaustive

opinion in the case of *People v. Pacheco*, 27 Cal. 175, 218, said:

“In our Constitution, as we have seen, there is no restriction upon the power of taxation, or upon the objects, or the time for which appropriations may be made, except that ‘no appropriation for a standing army shall be for a longer time than two years.’ As to all other objects, so far as any constitutional restriction is concerned, it may as well be for twenty as for two years. This may have been an unwise omission, and yet it does not seem to have been an oversight, for the attention of the framers of that instrument was directed to the subject, when the two years limitation was imposed upon ‘appropriations for a standing army.’ ”

The Colorado Constitution¹ is also identical upon the point involved here, and the legislature of that state on a resolution submitted to the Supreme Court the question of legality of continuing appropriations. The opinion of the court is found *In Re Continuing Appropriations*, 18 Colo. 192 (32 Pac. 272), as follows:

“As to those appropriations designated in the question as ‘continuing appropriations,’ that is, those the payment of which is to be continued beyond the next biennial session of the legislature, we see no constitutional objection thereto. The power of the legislature, except as otherwise restricted by the Constitution, is plenary over the entire subject. * * Under a similar provision with reference to appropriations to be found in the federal Constitution, such continuing appropriations have been made by Congress, apparently without question, and it has been resorted to in this state from the time of the inception of the state government. When such appropriations are for the whole or for a definite part of a certain special fund, we are of the opinion that they furnish sufficient authority for the disbursement of such fund. * * The fact that in several of the states of this Union it has been found

necessary to inhibit the making of continuing appropriations furnishes an argument against the policy of such laws that will undoubtedly be given due weight by the legislature; but with the policy or expediency the courts have nothing to do, the power of the legislature to make the appropriations being conceded."

In *Fleckten et al. v. Lamberton*, 69 Minn. 187, 191 (72 N. W. 65, 66), it is said:

"There is nothing in counsel's position that, because the life of the legislature continues for only two years, therefore it can make no standing appropriations, or appropriations covering a longer period of time than such two years. Section 9 of Article IX is no warrant for any such position."

The section of the Minnesota Constitution to which reference is made is the same as our own.

4-6. Analyzing the different acts of the legislature, we find that it has sanctioned the collection of certain fishing and hunting license fees, which shall be paid to county clerks and by them turned over to the state treasurer, who shall keep them in a separate fund known as the "Game Protective Fund Account." It has created a fish and game commission and vested it with discretionary power "to expend for the protection, preservation and propagation of fish and game, all funds of the State of Oregon acquired for the protection, preservation or propagation of fish and game, arising from state appropriations, licenses, gifts or otherwise," and such commission "shall have full power and authority to use so much of the state funds as may be necessary for the acquisition of lands, water rights and easements and other property." Vesting the commission with such authority is a matter in the discretion of the legislature, as to the wisdom of which people may differ in opinion. But that is a matter

upon which this court has no right to express its views. The purchase of the farm is germane to and within the purview of Chapter 257, Laws of 1915. The fund is not derived from taxation, and, although it is true that when collected it becomes public money, the power of the commission is limited to the amount thereof. Section 3 of Chapter 257, Laws of 1915, is in the nature of a continuing appropriation of the amount of such fund, which may be repealed by any ensuing legislature.

Carrying out the spirit and intent of the different legislative acts to which reference has been made, we hold that the issuing and payment of the warrant from the funds specified are within the authority conferred upon the fish and game commission, and that the demurrer should have been sustained. The decree of the Circuit Court is reversed and the suit is dismissed.

REVERSED. SUIT DISMISSED.

Argued March 18, affirmed April 13, 1920.

PORTLAND v. NEW ENGLAND CASUALTY CO.

(189 Pac. 211.)

**Municipal Corporations—Food for Horses Working on Project
“Material” Furnished Subcontractor.**

1. Food for horses used in the improvement of a street is “material” within the meaning of a bond executed under Section 6266, L. O. L., and Portland City Charter, Section 162, for the protection of subcontractor’s materialmen and laborers.

Pleading—Imperfect Statement Cured by a Verdict.

2. Where the sufficiency of a complaint is not questioned by demurrer, a verdict will cure formal defects, such as an improper statement, or the omission of formal allegations, and establishes every reasonable inference that can be drawn from the facts stated.

Municipal Corporations—Complaint on Contractor's Bond for Materials Furnished Sufficiently Showed That Subcontractor Entered upon Work.

3. In an action on the bond of a municipal contractor to recover for feed furnished a subcontractor, complaint *held* to sufficiently aver that the subcontractor entered upon the performance of the work under his contract.

Municipal Corporations—Furnisher of Horse Feed to Subcontractor Need not Show That All Horses Worked on Project.

4. A furnisher of horse feed to a subcontractor should not be required to watch and see that every bit of the feed supplied by him was fed to horses on the job; and, if some of the feed was used elsewhere, it rests with the bondsman of a municipal contractor to show that fact.

Municipal Corporations—Whether Horse Feed Furnished was Used in the Work Held for Jury.

5. In an action on the bond of a municipal contractor to recover for horse feed furnished a subcontractor, whether the feed was in fact used by the subcontractor to feed horses used on the work *held* for the jury.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1.

This is an action to recover upon a bond furnished to the City of Portland by a contractor, under a contract for the improvement of Nehalem Avenue, said bond being executed under the requirements of Section 6266, L. O. L., and Section 162 of the charter of the City of Portland, for the protection of subcontractors, materialmen and laborers employed under such contract. The beneficiary plaintiff is J. W. Hansen, whose claim is for hay and grain which he alleges were furnished to a subcontractor to feed the horses used in performing the work under the contract.

The defendants New England Casualty Company and Oregon Independent Paving Company filed a joint answer, wherein they admit the execution of the contract between the latter and the city, the execution of the subcontract with defendant Tomlinson for the grading of Nehalem Avenue, and the execution of the

bond upon which the action is based. The remaining allegations of the complaint are denied. A trial was had, which resulted in a verdict and judgment for plaintiff, and defendants appeal. **AFFIRMED.**

For appellants there was a brief over the names of *Mr. Jay Bowerman, Mr. W. B. Gleason* and *Messrs. Carey & Kerr*, with an oral argument by *Mr. Bowerman*.

For respondent there was a brief and an oral argument by *Mr. William P. Lord*.

BENSON, J.—The defendants base their right to a reversal of the judgment upon two propositions: First, that the complaint does not state facts sufficient to constitute a cause of action; and, second, that the trial court erred in denying their motion for a judgment of nonsuit.

1. The sufficiency of the complaint is challenged upon two grounds. The first is, that food for horses is neither labor nor materials, and that payment therefor is not included in the obligations of the bond. Upon the point thus raised there appears to be a conflict of authority in other jurisdictions, but so far as this court is concerned, the question has been definitely settled, and a conclusion reached which is contrary to defendants' contention, in the case of *Clatsop County v. Fidelity & Deposit Co. of Maryland*, ante, p. 2 (189 Pac. 207).

2, 3. Defendants further urge that the complaint is insufficient, in that it is not alleged therein that Tomlinson, the subcontractor, entered upon or did any of the work he contracted to do. In the consideration of this

proposition, we observe that the sufficiency of the complaint was not questioned by demurrer, and that:

“A verdict will cure formal defects in a pleading, such as an imperfect statement, or the omission of formal allegations, and establishes every reasonable inference that can be drawn from the facts stated”: *Booth v. Moody*, 30 Or. 222 (46 Pac. 884).

Keeping this rule in mind, we turn to the complaint, from which we quote the following allegations:

“That on the thirteenth day of March, 1913, defendant W. L. Tomlinson entered into an agreement and contract with defendant Oregon Independent Paving Company to perform all the labor necessary to complete the grading of Nehalem Avenue from the west line of East 19th Street to the east line of Grand Avenue, City of Portland, Oregon, under resolution number 26165, hereinafter mentioned, and in the performance of said contract said W. L. Tomlinson worked a number of horses in grading Nehalem Avenue hereinafter mentioned.

“That J. W. Hansen, during the course of the improvement of said Nehalem Avenue, and between the thirteenth day of March, 1913, and the twenty-fifth day of July, 1913, furnished and supplied and delivered to said defendant W. L. Tomlinson, a large quantity of grain and feed for the horses working on said improvement, which was used in feeding said horses while working on the improvement of said Nehalem Avenue.”

After verdict, we think that these allegations sufficiently aver that Tomlinson entered upon the performance of the work under his contract, and the contention that the complaint is insufficient is not sustained.

4, 5. We turn then to the question of whether or not the motion for a judgment of nonsuit was properly denied. Defendants insist that the testimony nowhere discloses that the horses for which the feed was sup-

plied were employed on the work under the contract referred to in the complaint. The evidence relating to the sale and delivery of the supplies for which a recovery is sought was furnished by the plaintiff and by his son, Arthur Hansen. The plaintiff himself testified that the subcontractor, Tomlinson, called at his place of business, and in arranging to purchase feed for his horses, told plaintiff that he had a contract with the defendant Oregon Independent Paving Company for completing the excavation and grading of Nehalem Avenue, and showed him the contract. He also says that the feed was to be delivered in the neighborhood of the improvement; that two loads of the materials were called for by Tomlinson's employees, and that they were then working on Nehalem Avenue; that on one occasion he went out to where the improvement was being carried on, and that the horses were then engaged on that work. Arthur Hansen testified that he delivered all of the supplies in person, except the two loads that were called for by Tomlinson's men; that when he took out the first load, he did not know where the horses were stabled, and as it was late in the evening when he reached the place where the work was being carried on, on Nehalem Avenue, he asked one of the teamsters there, who replied that in about fifteen minutes they would all be going to the stables, and so he waited and went with them. He says that they had three temporary stables in the vicinity of the work, "about eight blocks south of Nehalem Avenue." He also says: "These horses were working there on the job every time I was out there," and "I was out there every time a load went out, all but the two loads." At the time of the trial, the subcontractor, Tomlinson, had disappeared and could not be found, and his foreman had moved to Ohio, and so plaintiff was unable to

secure their testimony. In the foreclosure of a materialman's lien, it has been held that the materialman should not be required to watch the progress of a structure to see that every piece of material supplied by him was used therein, and that, if some of the material has been used elsewhere, it rests with the defendant to show that fact: *Fitch v. Howitt*, 32 Or. 396 (52 Pac. 192). We think that a similar course of reasoning may well be applied in a case like the one at bar. We are of the opinion that there was sufficient evidence upon the subject to justify its submission to the jury; and that it was not error to deny the motion for nonsuit. The judgment is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued September 24, affirmed October 21, 1919, rehearing denied April 20, 1920.

STATE v. SAVAGE.

(184 Pac. 567.)

Constitutional Law—No Burden not Imposed on Similar Class can be Imposed on One Class.

1. Generally, no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition, or in like circumstances; and no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes.

Constitutional Law—Equal Protection of Law Denied Unless Classification is not Arbitrary.

2. If statute applies only to one class of persons, and imposes upon them duties not common to others, there must exist in the relations of such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary, else there will be a denial of the equal protection of the law.

Fish—Law Applicable to Fish Applies to Crabs.

3. Crabs are fish, and the law applicable to fish is applicable to crabs.

Fish—Property Rights in Fish in State for Benefit of Citizens.

4. The title to migratory fish, *feræ naturæ*, while in a state of freedom, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity, for the benefit of and in trust for citizens of the state in common.

Constitutional Law—Prohibiting Taking of Salt-water Crabs, Class Legislation.

5. Laws of 1915, page 31, and Laws of 1917, page 848, amending Section 5360, L. O. L., prohibiting the taking of salt-water crabs from Coos County for purpose of sale, by making statute inapplicable to those engaged in canning business, without a good reason for so doing, *held* discriminatory class legislation, and void under Article I, Section 20, of the Constitution.

Statutes—Void Amendment Leaves Statute Unchanged.

6. Where amendments to section of the statute are void, the section itself remains intact and valid.

Fish—Restriction as to Catching in Certain Season or for Years or for Sale, Valid.

7. Legislature has the power to enact laws prohibiting the catching of fish or the killing of game for a certain term of years, or for a certain portion of the year, or in certain localities, where the conditions are different from those in other portions of the state, or for purposes of sale, or may restrict quantity of fish or game that may be caught or killed.

Constitutional Law—Local Laws cannot be Declared Invalid Unless Discriminatory or Arbitrary.

8. Where there is no express constitutional restriction against the passage of local laws by a state legislature, the courts cannot hold such laws void for want of constitutional authority to enact them unless they are clearly discriminatory or merely arbitrary.

Constitutional Law—Equal Protection of Laws Defined.

9. The equality clause, United States Constitution, fourteenth amendment, requires that the law, when impartially applied, shall operate equally and uniformly upon all persons in similar circumstances, and confers like privileges to all who may comply with its terms or come within its provisions, and does not prohibit legislation which is limited, either in the objects in which it is directed or by the territory within which it is to operate.

Fish—Statute Prohibiting Taking Salt-water Crabs in Certain County Constitutional.

10. Section 5360, L. O. L., prohibiting the taking of salt-water crabs from Coos County for purpose of sale, as it exists apart from the void amendments of 1915 and 1917, is an equal law, and is valid, since it confers equal rights on all citizens, subjects them to equal burdens, and imposes equal penalties on those who violate it.

Statutes—Constitutionality of Law Prohibiting Taking Salt-water Crabs in County Named for Purposes of Sale.

11. Section 5360, L. O. L., prohibiting the taking of salt-water crabs from Coos County for purpose of sale, as it exists apart from the void amendments of 1915 and 1917, is not such a special or local law as comes within the inhibition of Constitution, Article IV, Section 23, which inhibits the enactment of special or local laws "for the punishment of crimes and misdemeanors," since the provision for punishment as a misdemeanor for violation is merely incident to the act.

From Coos: JOHN S. COKE, Judge.

Department 2.

The defendant Norman C. Savage was convicted and fined \$25 for having on the twenty-seventh day of March, 1919, shipped or transported from Coos County to Portland, for sale, two salt-water crabs taken within said Coos County, and appeals from the judgment of conviction.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. L. R. Liljequist*.

For the State there was a brief over the names of *Mr. George M. Brown*, Attorney General, and *Mr. John F. Hall*, District Attorney, with an oral argument by *Mr. Hall*.

BEAN, J.—A demurrer was filed to the complaint against defendant which was first filed in the Justice's Court from which an appeal was taken by defendant to the Circuit Court, and it is contended that the statute which the defendant is accused of violating is unconstitutional, as in violation of Section 20 of Article I of the Constitution, which provides:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

An act "to provide for the preservation and protection of salt water crabs within the county of Coos, to regulate the sale and transportation thereof, to prohibit common carriers from conveying the same from said county, and providing penalties for violation of this act," was first enacted by the legislature in 1905, General Laws of Oregon, 1905, page 312. The first act contained a provision as follows:

"That this act shall not apply to the canning of salt-water crabs within said county or other exportation of the canned product thereof."

The act was amended by Chapter 40, General Laws of Oregon, 1907, page 52, which is Section 5360, L. O. L., and reads as follows:

"It shall be unlawful for any person within the county of Coos, State of Oregon, or within or upon the waters thereof, including all bays, harbors and inlets of said county, to kill, take, capture or destroy any greater number than fifty salt-water crabs in one day; and it shall be unlawful for any person or persons, firm or corporation within said county or upon the water thereof, to sell or offer for sale, exchange or transport outside of the said county, or have in possession, for the purpose of such sale or exchange or transportation from said county, any of the aforesaid salt-water crabs; and it shall be unlawful for any steamboat company, express company, or any other common carrier, or corporation, or the officers or agents thereof, or any other person, to transport or carry out of said county, or to receive or have in possession for the purpose of such transportation therefrom, any salt-water crabs, except for the purpose of exhibition or propagation; provided, that this act shall apply to the canning product of salt-water crabs within the said county and the exportation of the same therefrom."

By Chapter 16, General Laws of Oregon, 1915, page 31, this section was amended by changing the proviso so as to read:

“That this act shall apply to the canning product of salt-water crabs within the said county and the exportation of the same therefrom, except the operation of any and all crab canneries, factories or the handling, transportation or exporting of the product of any of such canneries as may have been in operation in said county of Coos at the time of the passage of Chapter 40, by the Legislative Assembly of the State of Oregon, in the year 1907, and all that may be in operation on and after January 1, 1917.”

In 1917 the legislature enacted Chapter 409, Laws of Oregon, 1917, page 848, amending Section 5360, so that it would read the same as above quoted except that it “provided, that this act shall apply to the canning product of salt-water crabs within the said county and the exportation of the same therefrom; provided, that this shall not apply to canneries now in existence until July 1, 1918.” It will be seen that the section of the Code as last amended provided that it should not apply to canneries then in existence until July 1, 1918, and that the act of 1915 did not apply to the canning factories or the transportation, or exportation of the product of such canneries as had been in operation in Coos County at the time of the passage of Chapter 40 by the legislative assembly in 1907, and that might be in operation on and after January 1, 1917. Section 2 of the act of 1905, and the same number of section of the act of 1907 which is Section 5361, L. O. L., provides that any person violating any of the provisions of the act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than \$25, nor more than \$500, together with costs

and in default of the payment of such fine, shall be imprisoned one day for every \$2 thereof.

It will be noticed that a person engaged in the canner business would have the privilege of catching any number of salt-water crabs, and transporting the same beyond the limits of the county of Coos for the purposes of sale without violating the terms of the statute, while other citizens doing the same thing in substantially the same manner would be subject to a penalty or imprisonment.

1. The general rule is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition or in like circumstances, and no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes. A statute infringes this guaranty if it singles out for discriminatory legislation particular individuals not forming an appropriate class, and imposes upon them burdens or obligations or subjects them to rules from which others are exempt.

2. If the statute applies only to one class of persons and imposes upon them duties not common to others, there must exist in the relations to such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary, else there will be a denial of the equal protection of the law: 6 R. C. L., p. 403, § 398; *Barbier v. Connolly*, 113 U. S. 27 (28 L. Ed. 923, 5 Sup. Ct. Rep. 357); *Yick Wo v. Hopkins*, 118 U. S. 356 (30 L. Ed. 220, 6 Sup. Ct. Rep. 1064); *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79 (46 L. Ed. 92, 22 Sup. Ct. Rep. 30); *State v. Richcreek*, 167 Ind. 217 (77 N. E. 1085, 119 Am. St. Rep. 491, 10 Ann. Cas. 899, 5 L. R. A. (N. S.) 874);

In re Opinion of Justices, 207 Mass. 601 (94 N. E. 558, 34 L. R. A. (N. S.) 604); *Boone v. State*, 170 Ala. 57 (54 South. 109, Ann. Cas. 1912C, 1065); *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497 (15 S. W. 87, 12 L. R. A. 70); *Nitka v. Western Union Tel. Co.*, 149 Wis. 106 (135 N. W. 492, Ann. Cas. 1913C, 863, 49 L. R. A. (N. S.) 337).

The general principle seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of immunity to those not subject to it. Particular laws granting special privileges and immunities must run the gauntlet of both the provisions of the fourteenth amendment to the federal Constitution which secures the equal protection of the laws and those of the state Constitutions which prohibit the enactment of special laws granting privileges and immunities. The tests, as to both, are substantially similar. Also the inherent limitations on legislative power may themselves be sufficient to nullify such laws. The provisions of the state Constitution are the antithesis of the fourteenth amendment in that they prevent the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailment of rights: 6 R. C. L., § 400, p. 406; 12 C. J., § 827, p. 1111; Cooley's Const. Lim., p. 561 et seq.; *State v. Nashville etc. R. Co.*, 124 Tenn. 1 (135 S. W. 773, Ann. Cas. 1912D, 805).

3. There is no question but that crabs are fish and the law applicable thereto applies: 19 Cyc. 987; 35 Cyc. 1454.

4. The title to migratory fish, *ferae naturae*, while in a state of freedom so far as a right of property can

be asserted is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for citizens of the state in common: *State v. Hume*, 52 Or. 1, 5 (95 Pac. 808); *State v. Catholic*, 75 Or. 367 (147 Pac. 372, Ann. Cas. 1917B, 913); *Portland Fish Co. v. Benson*, 56 Or. 147, 154 (108 Pac. 122).

5. No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos County, while another class of persons operating canneries should have the exclusive privilege of taking and shipping the same kind of fish beyond the limits of the county for the purposes of sale. The act of 1915 and that of 1917, clearly grants a special privilege or monopoly to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation and repugnant to Article I, Section 20 of the Constitution and void: *Monroe v. Withycombe*, 84 Or. 328, 336 (165 Pac. 227); *Hume v. Rogue River Packing Co.*, 51 Or. 237, 259 (83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 Am. St. Rep. 732, 31 L. R. A. (N. S.) 396); *Eagle Cliff Fishing Co. v. McGowan*, 70 Or. 1, 15 (137 Pac. 766); *Jones v. Union County*, 63 Or. 566, 574 (127 Pac. 781, 42 L. R. A. (N. S.) 1035; *State v. Wright*, 53 Or. 344, 348 (100 Pac. 296, 21 L. R. A. (N. S.) 349, and note); *Maxwell v. Tillamook Co.*, 20 Or. 495 (26 Pac. 803).

The legislative enactments of 1915 and 1917 above referred to amending Section 5360, L. O. L., being void, the question arises as to the validity of this section prior to the amendments. It will be noticed that Section 5360 enacted in 1907 is not subject to the objection which we have just considered and applies to all

persons alike. The rule is stated in 6 R. C. L., page 118, Section 117, as follows:

“An unconstitutional law cannot operate to supersede any existing valid law: (*Chicago I. & L. R. Co. v. Hackett*, 228 U. S. 559 (57 L. Ed. 996, 33 Sup. Ct. Rep. 581), and accordingly where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provision for the repeal of prior laws will fall with it and will not be permitted to operate as repealing such prior laws.”

6. In the present case the amendment itself according to the authorities above noticed is void. There was no attempt to enact a change of the statute, other than by the amendment, or to repeal the law as expressed in Section 5360, L. O. L. If there was no amendment of Section 5360, then it follows that this section remains intact and valid: *Portland v. Coffey*, 67 Or. 507, 515 (135 Pac. 358); *City of Portland v. Schmidt*, 13 Or. 17 (6 Pac. 221).

A further objection to the constitutionality of the law in question is made that it is in violation of subdivision 2, Section 23, Article IV of the Constitution, which inhibits the enactment of special or local laws, “for the punishment of crimes and misdemeanors.” This objection, if tenable, is applicable to Section 5360, L. O. L., prior to the void amendments. It is also urged that the law is special for the reason that it applies only to Coos County. Counsel for defendant cites a wealth of authorities from other states where the constitutions are different from ours.

7. It must be conceded that it is within the province of the lawmakers of the state to properly protect fish and game by the passage of appropriate laws: 12 C. J., p. 1172, § 915. We think it is valid for the legislature to enact a law prohibiting the catching of fish or the

killing of game for a certain term of years, or for a certain portion of the year, or to prohibit the taking of fish or the killing of game in certain localities, where the conditions are different from those in other portions of the state, or that the taking of such fish or the killing of such game may be restricted in quantity or number, or by not permitting the same for purposes of sale: 19 Cyc. 1009, note 19; *Osborn v. Charlevoix*, *Circuit Judge*, 114 Mich. 655 (72 N. W. 982).

8. Where there is no express constitutional restriction against the passage of local laws by a state legislature, the courts cannot hold such laws void for want of constitutional authority to enact them, unless they are clearly discriminatory or merely arbitrary. There is a distinction between special laws and class legislation.

9. The equality clause only requires that the law when impartially applied shall operate equally and uniformly upon all persons in similar circumstances, and confers like privileges to all who may comply with its terms or come within its provisions. It does not prohibit legislation which is limited, either in the objects in which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like conditions: 6 R. C. L., § 413, p. 417; § 414, p. 418; *In re New York Elevated R. R. Co.*, 70 N. Y. 327, 346; *People v. Squire*, 107 N. Y. 593 (14 N. E. 820, 1 Am. St. Rep. 983, note, p. 903); *People v. Judge*, 17 Cal. 547; *State v. Ellet*, 47 Ohio, 90 (23 N. E. 931, 21 Am. St. Rep. 772, note, pp. 780-789).

10. Section 5360, L. O. L., as enacted in 1907 confers equal rights on all citizens of the state and subjects them to equal burdens, and imposes equal penalties on every person who violates it. Although no one can

ordinarily enjoy the right, or be subject to the burden or infringe its provisions without going to, or being within Coos County, it is an equal law and valid: *State v. Griffin*, 69 N. H. 1 (39 Atl. 260, 76 Am. St. Rep. 139, note, pp. 147-154, 41 L. R. A. 177); *Arms v. Ayer*, 192 Ill. 601 (61 N. E. 851, 85 Am. St. Rep. 357, 360, 58 L. R. A. 277); *Wanser v. Hoos*, 60 N. J. Law, 482 (38 Atl. 449, 64 Am. St. Rep. 600, 614). There is nothing in our Constitution to prevent the enactment of a local law for the protection of fish and game. *Fouts v. Hood River*, 46 Or. 492, 504 (81 Pac. 370, 7 Ann. Cas. 1160, 1 L. R. A. (N. S.) 483), is an analogous case on this point. There are numerous laws in this state which have stood the test of many years prohibiting the killing or slaughtering of game or the catching of fish at certain seasons of the year in certain localities. If all persons who catch fish or kill game in a certain place within this state are subject to the same law, and the law applies to everyone alike, it is a general law. In *State v. Sturgess*, 9 Or. 537, 539, this court recognized the validity of a local act of October 16, 1878, establishing "such regulations for the protection of salmon in the particular locality embraced by it, as the legislature deemed necessary and expedient, in view of the peculiar condition of the Columbia River * * ": *State v. McGuire*, 24 Or. 366 (33 Pac. 666, 21 L. R. A. 478). In *Portland Fish Co. v. Benson*, 56 Or. 147 (108 Pac. 122), it was held in relation to closing portions of a stream that this affects the locality and not the individual. Mr. Justice EAKIN said:

"A law that operates only in a limited territory to accomplish a specific purpose does not deny equal protection of the laws, as it affects all persons equally and impartially who are similarly situated: 6 Am. & Eng. Enc. Law (2 ed.), 80."

In *State v. Marco*, 93 Or. 333 (183 Pac. 653), a statute making it unlawful to take certain fish by means of purse seines east of a described line in the Columbia River was enforced. In *Ladd v. Holmes*, 40 Or. 167, Mr. Justice WOLVERTON, at page 172 of the opinion (66 Pac. 714, at page 716, 91 Am. St. Rep. 457), said:

“A law may be general, however, and have but a local application, and it is none the less general and uniform, because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted; and, in determining whether a law is general or special, the court will look to its substance and necessary operation, as well as to its form and phraseology.”

In principle the question is settled in this state. The county of Coos was mentioned in the statute as a convenient method of describing the waters thereof including all bays, harbors, and inlets of the county. It is not suggested that on account of the description of the restricted area the practical application of the law would work any inequality on any particular body of water or stream, but the contention is that the act must apply to the whole state in order to be valid.

11. Section 5360, L. O. L., is not such a special or local law as comes within the inhibition of Section 23, Article IV, of the Constitution, for the reason it provides for the punishment as a misdemeanor for a violation of its provisions as that is merely incident to the act. If the legislature can enact a law for the protection of fish and game in a certain section or part of the state, then it follows that the law may be enforced by the punishment of a violation thereof. The apparent purpose of the act is for the protection of salt-water crabs: *Ladd v. Holmes*, 40 Or., at page 177 (66 Pac. 714, 91 Am. St. Rep. 457); *Harper v. Galloway*, 58 Fla.

255, 265 (51 South. 226). The second proviso of the act of 1917 is to the effect that it shall apply to canneries after July 1, 1918. According to our view holding this section of the law prior to the two later attempted amendments valid, it is unnecessary to consider the effect of this last proviso in the act of 1917, as the same result would be obtained whichever way it might be decided in regard thereto.

Since the act with which the defendant was charged by the complaint, and for the commission of which he was convicted and fined, was in violation of Section 5360, which is a valid law, it follows that the demurrer filed by the defendant was properly overruled, and that the judgment of the lower court should be affirmed. It is so ordered. **AFFIRMED. REHEARING DENIED.**

McBRIDE, C. J., and JOHNS and HARRIS, JJ., concur.

Rehearing denied April 20, 1920.

PETITION FOR REHEARING.

(189 Pac. 427.)

On petition for rehearing. Petition denied and former opinion approved. **REHEARING DENIED.**

Mr. L. A. Liljequist, for the petition.

Mr. John F. Hall, District Attorney, and *Mr. George M. Brown*, contra.

Department 2.

PER CURIAM.—For the reasons given in the original opinion, as well as those set forth in *State v.*

Blanchard, post, p. 79 (189 Pac. 421), this day decided, we adhere to our former opinion, and the petition for rehearing is therefore denied.

AFFIRMED. REHEARING DENIED.

Argued March 18, reversed and remanded April 20, 1920.

BILYEU v. CROUCH.

(189 Pac. 222.)

Wills—Testator's Intent Derived from Instrument Controls.

1. The rule that the controlling factor in the construction of a will is the determination of the intent of the testator from the instrument is codified in Section 7347, L. O. L.

Wills—Limitation Over on Death Means Death Before Death of Testator.

2. Where an absolute estate is devised to be defeated by devisee's death and nothing else is declared as a condition, the estate will become absolute unless the devisee dies before the testator.

Wills—Death of Beneficiary Held to Defeat Estate Which Passed to Others.

3. Where a woman devised lands to her two sons and their male heirs, with the provision that if either should die without male heirs the land should pass to their female heirs and in case of death without issue should be divided between the testatrix's two daughters, the daughters on death of the one of the devisees without issue became entitled to the property under the executory devise despite Section 7344, L. O. L., declaring that a devise of real property shall be taken as a devise of all the estate and interest of the testator unless it clearly appears that he intended to devise a less estate.

Quieting Title—Plaintiffs in Possession Without Title must Account for Rents and Profits.

4. Where plaintiffs' title ceased on the death of their grantor and an interest in the lands passed to defendant by way of executory devise, defendant's demand on plaintiffs in a suit to quiet title to account to defendant for the rents and profits accruing after death of their grantor was improperly denied.

From Linn: **GEORGE G. BINGHAM**, Judge.

Department 1.

This is a suit to quiet the title of the plaintiffs in the south half of the wife's moiety of the donation land

claim of Charles T. Ingram and Eliza Ann Ingram, his wife, in Linn County, Oregon. The plaintiffs claim to be the owners in fee simple of this tract. They assert title by virtue of mesne conveyances from Frank Ingram. Whatever title the latter had came to him by virtue of the last will and testament of his mother, Eliza Ann Ingram, the third clause of which, and the one principally affecting this litigation, reads as follows:

“I give and bequeath unto my two sons, Frank Ingram and John L. Ingram, and their heirs male of their body, my donation land claim aforesaid, subject to the life estate of my husband, Charles T. Ingram, to be equally divided between them by a line running east and west. My son, Frank Ingram, to have the south half and my son, John L. Ingram, to have the north half of my said donation land claim. But in case the said Frank and John L. Ingram or either of them should die without male heirs, then the said lands shall go to their female heirs, respectively. But in case the said Frank and John L. Ingram or either of them should die without issue, then the said lands bequeathed to them shall be equally divided between my daughters, Anna Ingram and Mary Jane Ingram, and their heirs forever, that is to say: If Frank Ingram should die without issue then his portion, or the south half of said land, shall be equally divided between Anna and Mary Jane Ingram, and if John L. Ingram should die without issue his portion of said land shall be equally divided between Anna and Mary Jane Ingram and their heirs forever.”

Eliza Ann Ingram, the testatrix, made the will in question September 11, 1870. She died on November 12, 1888. Her husband, Charles T. Ingram, survived her and died June 14, 1889. The first clause of her will gave to her husband the sole use of her half of the donation land claim mentioned, during his natural life. Anna Ingram, the daughter of the testatrix, referred

to in the quoted third clause, intermarried with James Crouch and died December 31, 1892, leaving the defendant Chester Crouch, her son, the sole issue of her marriage. Frank Ingram died November 8, 1915, never having married and never having had any children. James Crouch, the husband of Anna Ingram, disclaims all interest in the realty involved, but Chester Crouch traversed the complaint in material particulars, besides asserting title in himself. The issue to be determined arises between the plaintiffs and Chester Crouch. From a decree of the Circuit Court on these admitted facts, to the effect that the plaintiffs are the owners in fee simple of the real property mentioned and the whole thereof, and that the defendants have no right, title or interest of any kind therein the defendant Chester Crouch appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Hill & Marks*, with an oral argument by *Mr. Gale S. Hill*.

For respondents there was a brief and an oral argument by *Mr. James R. Wyatt*.

BURNETT, J.—Substantially, the contention of the plaintiffs is that the condition in the will to the effect that, if Frank Ingram should die without issue, then the land bequeathed to him should be equally divided between the daughters of the testatrix, Anna and Mary Jane Ingram, and their heirs forever, refers to the death of Frank Ingram occurring prior to the death of the testatrix. The defendant maintains that the language refers to the demise of Ingram at any time,

whether before or after that of his mother, who made the will.

Eliza Ann Ingram owned a fee-simple estate in the land as the donee of the United States government. It is said in Section 7344, L. O. L.:

“A devise of real property shall be taken and deemed as a devise of all the estate or interest of the testator therein subject to his disposal unless it clearly appears from the will that he intended to devise a less estate or interest.”

Claiming a fee-simple estate in the land and derailing their title from Frank Ingram under the circumstances already mentioned, it is incumbent upon the plaintiffs to show that he took a fee simple, the highest estate a man can have in lands, for their title cannot rise higher than its source.

1, 2. The parties are agreed, and it is not necessary to cite precedents in support of the proposition, that the controlling factor in the calculation is the intent of the testatrix, to be derived from a careful examination of her testamentary declaration. This is codified in Section 7347, L. O. L. The authorities are uniform to the effect that where an absolute estate is devised to an individual to be defeated by his death, and nothing else is declared as a condition, his decease must be considered as one happening before that of the testator. The divergence of precedents occurs when some qualification is attached to the certain event of the death of the devisee. The authorities are multitudinous on both sides of this question, and, as many other courts have declared, we will not attempt to distinguish or reconcile them.

3. It has been said that no will has a twin brother, and these numerous precedents are varied and affected by the peculiar provisions of the will under considera-

tion in each particular case. In this state the question has been foreclosed by the early decision of *Rowland v. Warren*, 10 Or. 129. There the testator bequeathed certain realty to his youngest daughter, Mary E. Hembree, "to her and her body heirs forever," and by a later clause in the will declared:

"I further will that if my daughters Martha Ann and Mary E. Hembree die without children, the land shall revert back to my other heirs."

Mary E. married and died leaving three living children. During her married life an execution on a judgment against her was levied upon the land devised to her, and Warren bought the land at the execution sale, which was confirmed to him and a deed was issued by the sheriff in pursuance thereof. After the death of Mary E., her children brought suit to remove the cloud which they predicated on those proceedings, but the court held that the contingency defeating her estate did not happen, and hence the sale conveyed to the defendant a fee-simple title. The inference to be drawn from this opinion conversely would be, that if she had died without children, or, in the words of the will, "her body heirs," the estate devised to her would have been defeated.

Substantially the same conclusion was reached in *Love v. Walker*, 59 Or. 95 (115 Pac. 296). The will of Lewis Love divided his property into seven parts, one of which he gave, devised and bequeathed to his son Green C. Love. By a later codicil he said:

"I hereby will, decree and declare that the devise or legacy in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death without lawful issue, born alive and living at the time of his death, then the said devise or legacy to him shall belong

and go [to] the remaining devisees of my said will in proportion as they hold of the shares or parts of my said will.”

In a suit by Green C. Love to quiet his title to the property after the death of his father, Lewis Love, it appeared that he had two grandchildren living, as well as his wife, his children being all dead. In the opinion by Mr. Justice MOORE the majority of the court construed the will so as to confer upon Green C. Love a life estate in the property. Arguing on the basis adopted in that case by the majority of the court, it would seem to the writer that the estate cast upon Green C. Love by the will of his father and the codicil would be more accurately described as a defeasible fee conditioned upon his dying leaving surviving him issue of his body, and without leaving a widow. But as applied to this case, the opinion there is authority for the doctrine that his estate in fee was defeated by the events happening after the death of the testator.

In *Britton v. Thornton*, 112 U. S. 526, 532 (28 L. Ed. 816, 5 Sup. Ct. Rep. 291, 294), it was held in an opinion by Mr. Justice GRAY that:

“It is equally clear that upon her death under age and without issue then living, her estate in fee was defeated by the executory devise over. When indeed a devise is made to one person in fee, and ‘in case of his death’ to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator’s lifetime. * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated,

at any time, whether before or after the death of the testator."

In that case the devise over was to Eliza Ann Thornton, provided that "should the said Eliza Ann die in her minority, and without lawful issue then living, the land hereby devised shall revert and become a part of the residue of my estate hereinafter disposed of." It thus appears that the testatrix in the instant case, although seised of a fee-simple estate in the land, devised to her immediate beneficiaries a less estate. We note first the life estate to her husband; second, to Frank Ingram and the heirs male of his body; third, in default of male children, to his daughters; and lastly, in default of issue of his body, to his sisters. It was plain that the testatrix never intended that her son Frank should take an absolute fee-simple estate in the land. It is manifest that she intended to control the stream of descent as it affected the land, long after her death. This is shown by the fact that she interposed a life estate of her husband, which would not come into existence until after her decease and which should be fulfilled before Frank Ingram could come into the enjoyment of the property. Dying without issue, he failed to fulfill the conditions upon which his estate depended. It became a case of possibility of issue extinct. Hence, his death cast the remainder as an executory devise upon his sisters and, in the language of the will, "their heirs forever." The defendant Chester Crouch comes within this category as the sole heir of his mother, Anna Ingram, respecting an undivided half of the south half of the claim of the testatrix. The decree of the Circuit Court will be reversed and one will be entered here declaring Chester Crouch to be the owner in fee simple of an undivided

half of the south half of the north half of the donation land claim of Charles T. Ingram and Eliza Ann Ingram, his wife.

4. The answer of the defendant in the Circuit Court by appropriate averments called upon the plaintiffs to account for the rents, issues and profits accruing after the death of Frank Ingram. The Circuit Court sustained a demurrer to that answer and hence ignored the demand for an accounting. This was erroneous, and therefore the cause will be remanded to the Circuit Court, with directions to permit the parties to frame an issue respecting the accounting as it affects the rents, issues and profits of the land accruing after the death of Frank Ingram, and proceed to the trial of the issue thus framed. **REVERSED AND REMANDED.**

McBRIDE, C. J., and BENSON, J., concur.

HARRIS, J., concurs in the result.

Argued March 23, affirmed April 20, 1920.

O'DAY v. SPENCER.*

(189 Pac. 394.)

Appeal and Error—Findings of Court Sitting Without Jury have Effect of Verdict.

1. Findings of fact by court where jury was waived have the effect of a verdict, and must be sustained if supported by any evidence.

Account Stated—Not Presumed to Extend to Items Arising After Statement.

2. An account stated is not presumed to extend to items arising after statement of the account.

*The question of admissibility, as between third parties, of entries against interest made by deceased persons in books of account is discussed in a note in 2 B. E. O. 670. **REPORTER.**

Evidence—Testimony as to Entries by Deceased in His Account-book Admissible.

3. Under Section 790, L. O. L., parol evidence that entries in the book of accounts of an attorney were in his handwriting was admissible in an action by his executrix to recover for services rendered.

Attorney and Client—Attorney's Right to Compensation will not be Denied Because His Opinion was Erroneous.

4. Where it appeared that defendant received a large sum of money as result of litigation, and there was no showing that the attorney's fee was to be contingent, the fact the attorney erroneously represented a sheriff's sale was valid will not, where there was no showing that defendant relied on it or was injured, prevent recovery of compensation.

Attorney and Client—Evidence Held Sufficient to Sustain Judgment in Favor of Attorney's Executrix.

5. In an action for legal services brought by an attorney's executrix, evidence held sufficient to sustain the judgment of \$250 for services; the opinion of another attorney not being contradicted.

[As to what is a reasonable attorney's fee in absence of contract, see note in Ann. Cas. 1916B, 263.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2.

The plaintiff as executrix of the estate of her deceased husband, Thomas O'Day, seeks to recover for certain legal services alleged to have been performed by him for the defendant. The first cause of action is upon a stated account for \$1,765.15 rendered December 28, 1914, upon which \$1,650 has been paid.

The second cause of action is for \$1,000 for services growing out of the defendant's case against the Monarch Transportation Company, in which it is claimed that the company paid \$500 of that amount to the defendant, who then promised and agreed to pay the \$1,000 to the deceased, but that no part thereof has been paid.

The third cause of action is for alleged services performed in the case of Elijah Corbett Company against the defendant and others, said to be of the reasonable value of \$250.

For answer the defendant makes a general denial, and as a further and separate defense alleges that about December 28, 1914, "the said Thomas O'Day rendered to this defendant a statement of account of all the cases and matters in which the said Thomas O'Day had performed services for this defendant and had not been paid in full, and according to the account stated so rendered there was then due the said Thomas O'Day" the sum of \$1,265.15. The defendant then alleges certain payments and admits the balance of \$115.15, which he tenders into court, and prays that it be accepted in full settlement of plaintiff's claims.

Replying, the plaintiff alleges that Judge O'Day's employment "did not cease in the latter part of 1914"; admits the rendition of the stated account of December 28, 1914, but alleges that "said account did not include services for the negotiation and sale of the certificate of sale in the case of *E. W. Spencer v. Monarch Transportation Co.*, or services in the case of *Elijah Corbett Co. v. Spencer et al.*"

A jury was waived, and trial was had before the court, which made findings of fact to the effect that the second and third causes of action were not included in or a part of the stated account in the first cause, and that plaintiff was entitled to recover the full amount of her claim in each cause of action. Judgment was rendered in her favor against the defendant for \$1,365.13, with interest at 6 per cent from October 1, 1915. The defendant appeals, claiming that the court erred in the admission of an entry in the handwriting of the deceased as to the \$1,000 charge which he made in his office books against the defendant, and in holding that plaintiff's right to recover was based upon a written instrument which provided:

“Should Spencer’s title to said certificate fail so that the said Getz cannot receive the title purporting to be conveyed thereby, said Spencer agrees to refund to said Getz all moneys paid by said Getz hereunder”

—for the reason that it was conditioned upon the validity of the sheriff’s certificate of sale and deed, which have since been found to be illegal and void, although the deceased represented them to be legal and valid instruments and the defendant relied upon such representations. It is further asserted that the court committed error in refusing to strike out certain testimony as to the third cause of action.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Seneca Fouts* and *Mr. Paul Mahoney*, with an oral argument by *Mr. Fouts*.

For respondent there was a brief over the names of *Mr. J. M. Haddock* and *Mr. James G. Wilson*, with an oral argument by *Mr. Haddock*.

JOHNS, J.—1. As the case was tried by the court without a jury, its findings of fact are as binding and conclusive upon this court as a verdict, and must be sustained if they are within the issues and there is any evidence to support them: *Wheelock v. Richardson*, 91 Or. 87 (178 Pac. 377); *Puffer v. Badley*, 92 Or. 360 (181 Pac. 1, 4 A. L. R. 1561). There is no dispute as to the first cause of action.

2. The trial court received evidence tending to show that the charges specified in the second and third causes of action were not included or embraced within the stated account upon which the first cause is founded.

That ruling was correct. The law is well stated in 1 Cyc. 453, as follows:

“An account stated or settled is *prima facie* to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of its statement. But this presumption does not extend to a cause of action which had not accrued at the time of the statement of the account. Nor will the parties be concluded by such presumption as to matters which were not contemplated by them, or which were not in fact included in the statement or settlement, though they existed at the time, but the presumption will be destroyed when the details of the settlement show that the matter in controversy was not included.”

In *Normandin v. Gratton*, 12 Or. 505 (8 Pac. 653), this court, speaking by Mr. Justice LORD, said:

“The question asked and answered by the witness was evidence tending to rebut the presumption of the settlement alleged, including all demands between the parties, and was admissible. It is conceded that a settlement between the parties is *prima facie* to be taken as a settlement of all demands, but is not conclusive, and is no bar to a recovery for matters not included in the settlement, though existing at the time: *Nichols v. Scott*, 12 Vt. 47; *Ryan v. Rand*, 26 N. H. 15. The object of the question was to show that the matter referred to was not included in the account stated, and thus rebut the presumption that it included all previous transactions: Whart. Ev., § 1331, notes. As such the question was admissible, and the objection was properly overruled.”

3. As to the second cause of action the court received parol evidence that certain entries in his book of accounts were in the handwriting of the deceased, and that they were made at a certain time and under circumstances stated. It is claimed that such testimony was incompetent. It was clearly admissible under Section 790, L. O. L., which provides as follows:

“The entries or other writings of a like character of a person deceased or without the state, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as primary evidence of the facts stated therein, in the following cases: * *

“2. When it was made in a professional capacity, and in the ordinary course of professional conduct. * * ”

The testimony is clear that the entry was made by the deceased as an attorney, in the ordinary course of his professional business.

4. The defendant claims that Judge O'Day should not have received a fee of \$1,000 for his services in the second cause of action; that the deceased represented to him that all of the legal proceedings, including the sheriff's sale were valid; that he relied upon such representations, but that it has since been decided that the sheriff's certificate of sale was void. However, the fact remains that the defendant received and now has the \$8,600 from and out of which he agreed to pay the deceased \$1,000, and that there is no evidence that he has ever been called upon or will ever be required to refund the money which he received, that he relied upon any representations made to him by the deceased, or that payment for Judge O'Day's services was to be in the nature of a contingent fee.

5. The third cause of action is for \$250 as a fee for legal services rendered by the deceased for the defendant in the case of Elijah Corbett Company against him. From the evidence, it appears that this was important litigation, to which the deceased devoted considerable time in studying the legal questions involved, and prepared and filed an answer. The only evidence as to the reasonable value of such

services is the undisputed testimony of attorney Haddock, and the claim of the defense is that the amount of that fee was included in the stated account, which contention was overruled by the trial court.

As the Circuit Court found in favor of the plaintiff upon all of the material issues and there is competent evidence to support the findings, the judgment is affirmed. **AFFIRMED.**

McBRIDE, C. J., and BENNETT and HARRIS, JJ.,
CONCUR.

Argued March 11, affirmed April 20, 1920.

STATE v. BLANCHARD.*

(189 Pac. 421.)

Statutes—Title of Act Regulating Fishing Held to Embrace Subject of Justice Court's Jurisdiction Over Prosecutions.

1. Laws of 1915, page 226, which, with Section 5257, L. O. L., as amended by Laws of 1915, page 60, and Section 5283, prescribe comprehensive regulations for fishing, and for punishment for violations, is not invalid, under Article IV, Section 20, of the Constitution, declaring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, because Section 23 declares that, unless otherwise specifically provided, Justices' Courts shall have concurrent jurisdiction in the first instance with the Circuit Court of all offenses; that provision being connected with the subject matter of the act.

Fish—Held in Trust by the State for the People.

2. In so far as fish in streams of the state can be said to be property, they are held by the state in trust for the people.

Statutes—Statute Fixing Different Regulations for Fishing in Different Counties not "Local Law."

3. Though Laws of 1915, page 60, amending Section 5257, L. O. L., provides different regulations for fishing in different coun-

*On the question as to what discrimination as to persons is permissible in the fish and game laws, see notes in 39 L. R. A. 581, 60 L. R. A. 481, and 26 L. R. A. (N. S.) 794. **REPORTER.**

ties of the state, it is not invalid, under Article IV, Section 23 of the Constitution, declaring that the legislature shall not pass special or local laws for punishment of crimes, for, though violation of regulations applicable to particular streams is made an offense, the act is not a "local law," which, properly speaking, is one whose operation is confined within territorial limits other than those of the whole state, or any properly constituted class of localities, while these special regulations as to particular streams apply to all of the people of the state alike.

[As to the validity and construction of statute regulating method of taking fish, see note in *Ann. Cas.* 1917D, 814.]

Fish—Courts Should not by Technical Construction Overthrow System of Statutory Legislation of Fishing Industry.

4. In view of the magnitude and productiveness of the fishing industry, the courts should not, by narrow construction of constitutional provisions, destroy the statutory system regulating the fishing industry.

Indictment and Information—Indorsement of Statute Supposedly Violated Adds Nothing.

5. Indorsement on a complaint of the statutes supposedly violated adds nothing, and is not even required.

Criminal Law—Objection That Complaint Stated Two Offenses and was Indefinite Held not Raised by Demurrer.

6. Where a complaint charging that defendant unlawfully operated a set-net bore the indorsement, "Sec. 1, Chap. 362, Laws 1917, for penalty, Chap. 31, Laws 1919," and the indorsement was amended by striking out the reference to Laws of 1917, and inserting Section 1, Chapter 49, Laws of 1915, instead, the objection on appeal that the complaint was indefinite and stated violation of the two different laws was not raised by demurrer attacking jurisdiction of the court and the sufficiency of the facts stated to constitute an offense, and such matter could be raised only by demurrer, under Section 1491, subdivisions 2, 3, L. O. L.

Fish—"Set-net" and "Drift-net" Defined.

7. Within the Oregon statutes limiting fishing rights and regulating the use of nets, the term "drift-net" means a net with both ends free to drift with the current, while a "set-net" is one fastened at one or both ends, so the whole net cannot drift with the current, and notwithstanding this be in a condition to take fish.

Fish—Evidence Held to Show That Defendant Operated Set-net Over More Than One Third of a Stream.

8. In a prosecution for unlawfully operating a set-net, evidence held to show that defendant operated such a net, and that it extended more than one third the distance across the body of water, in violation of Laws of 1915, page 60.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2.

The complaint, as originally filed in the Justice's Court, charged that the defendant did—

“Unlawfully operate a set-net in the waters of Hoquarton Slough, Hoquarton Slough then being a tributary of Tillamook Bay, which said set-net then and there extended more than one third of the distance across the waters of said slough, provided said distance should have been measured from the edge of said waters.”

Upon the lower left-hand corner of the complaint was indorsed the following words and figures, to wit:

“Sec. 1, Chap. 362, Laws 1917, for penalty, Chap. 31, Laws 1919.”

The defendant interposed a demurrer to this complaint, and based the same upon two different grounds, to wit: (1) That the said Justice's Court had no jurisdiction to try the defendant upon said complaint, and (2) that said complaint did not state facts sufficient to charge defendant with the commission of a crime. This demurrer was overruled, after which the court allowed the district attorney to mark out said indorsements on the complaint, to wit: “Sec. 1, Chap. 362, Laws 1917, for penalty, Chap. 31, Laws 1919,” and allowed said district attorney to indorse on said complaint, the following words and figures, to wit: “Sec. 1, Chap. 49, Laws 1915.”

Thereupon the defendant pleaded “not guilty,” and upon trial was found guilty and sentenced as aforesaid. Upon appeal to the Circuit Court the defendant interposed the same demurrer as in the Justice's Court, and the same was overruled. Defendant then pleaded “not guilty” and upon trial

was found guilty and sentenced to pay the sum of \$100 and the costs of the action. During the progress of the trial the defendant seasonably objected to the introduction of any testimony for the reasons already stated, which was denied by the court; subsequently, at the close of the testimony, defendant requested the court to direct the jury to return a verdict in his favor, which was also refused by the court. The defendant appeals from the judgment of the trial court upon the verdict mentioned.

It is contended by the appellant that neither the Justice's Court nor the Circuit Court had any jurisdiction to try the appellant, in that the complaint did not state facts sufficient to constitute a crime, for the reason that it does not show under which of two different statutes he was being tried. It is further contended that the act (Chap. 49, Laws 1915) under which defendant was convicted was not constitutional, in that the title of said enactment did not contain any reference to the granting of special jurisdiction to Justice's Courts, whereas the act itself made special provision for enlarged jurisdiction for Justice's Courts. It is also contended that the legislation, whichever act he was tried under, is void and unconstitutional, in that it is local and special, applying to only a limited number of streams and arms of the sea, of which fact this court has judicial knowledge, and again that the evidence does not warrant nor sustain a verdict of guilty, because it does not show that appellant, at the time of his arrest by the fish and game warden of the State of Oregon, was operating a set-net, that is, one which was stationary, fastened at both ends, but, on the contrary, that one end at the time was free,

and was permitted consequently to drift according to nature with the current of the tide.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Talmage, Claussen & Mannix*, and *Mr. Webster Holmes*, with an oral argument by *Mr. Joseph Mannix*.

For the State there was a brief over the names of *Mr. L. A. Liljequist* and *Mr. T. H. Goyne*, District Attorney, with an oral argument by *Mr. Liljequist*.

McBRIDE, C. J.—1. Reversing the order in which defendant's objections are stated in the brief, we will first consider the question raised as to the constitutionality of the act.

There are upon the statute books two laws applicable to this opinion. The first of these is Section 5257, L. O. L., as amended by Chap. 49, Gen. Laws 1915, which amended section reads as follows:

“Sec. 5257. It shall be unlawful for any person or persons to construct, maintain, or operate any trap, weir, fishing dam, or fish wheel in any of the following named streams, or to operate any set net or other fixed appliance which shall extend more than one-third across any of the waters thereof; Willamette River and its tributaries, Rogue River and its tributaries, Umpqua River and its tributaries, Tillamook Bay and its tributaries, Alsea Bay and its tributaries, Windchuck River, Chetco River, Pistol River, Elk River, Sixes River, Coquille River, Coos Bay, Lower Ten Mile Creek, Upper Ten Mile Creek, Siuslaw River, Beaver Creek, Yaquina Bay, Siletz River, Salmon River, Nestucca Bay, Nehalem River, Elk Creek, Necanicum River, Klamath River and tributaries; *provided*, that the provisions of this section shall not be construed to apply to that portion of the Necanicum Creek or River below (the

lowermost bridge which is now constructed on said creek or river, or their tributaries) the lower end of riffles at Seaside House.”

In 1917, by Chapter 362, Gen. Laws of that year, it was enacted that,—

“Sec. 1. From and after the passage of this Act, it shall be unlawful to set or operate any setnet in any of the waters of District Number Two, in the State of Oregon, wherein it is lawful to use and operate such setnets, in such a way that said setnet shall at any time extend more than one-third of the distance across any of said waters, said distance to be measured from the edge of said waters.

“Sec. 2. Any violation of this Act shall be subject to the same penalties as are prescribed by Section 25 of Chapter 188 of the Session Laws of 1915.”

Section 25 of Chapter 188, Laws of 1915, prescribes the punishment for violation of any of the provisions of that act, and Section 23 thereof provides:

“Unless otherwise specifically provided, Justice Courts shall have concurrent jurisdiction in the first instance, with the Circuit Court of all offenses under this Act.”

By the provisions of Section 5283, L. O. L., District No. 1 includes the Columbia River, and all tributaries thereto, over which the state has jurisdiction. District No. 2, mentioned in the act of 1917, includes all coast streams and their tributaries south of the Columbia River.

It is very earnestly and ably contended that the two acts above recited are void, because in contravention of Sections 20 and 23 of Article IV of the Constitution, which provide that—

“Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.”

It is urged that because the act of 1915 contains a clause providing that Justices' Courts shall have jurisdiction of the offense described therein, and that this feature of the act does not appear in the title, the act is void. We are of the opinion that the punishment to be meted out for an infraction of the laws, and the court which may inflict the punishment, are matters “properly connected” with the act; and that the title is sufficient. Such provisions have not been infrequent in our legislation under titles no more comprehensive than in the present instance.

2, 3. Article IV, Section 23, above referred to, provides that the legislature shall not pass special or local laws providing for the punishment of crimes and misdemeanors, and it is urged that, if the state is proceeding under Chapter 49 of the Laws of 1915, such act is void, for the reason that it designates certain streams along the Pacific Coast, in which it is unlawful to place a set-net more than one third of the distance across the stream, and does not include other streams said to be the resorts of salmon. The argument of counsel is clearly put, and, as it fairly presents an objection which has been frequently urged in similar cases, we give it in his own language:

“We next contend that if the state is proceeding under Chapter 49, Laws 1915, the defendant should not be found guilty, for the reason that said statute is repugnant to Article IV, Section 23, and Article IV, Section 20, Oregon Constitution. This statute is so drawn as to select and specify certain streams and waters in the State of Oregon, to the exclusion

of a very great number of other streams which flow into the ocean. It is not a general law covering all streams and waters, but is a local and special enactment. It is a matter of common knowledge to all that there are a very large number of streams and lakes which empty into the ocean and which contain large numbers of salmon and other anadromous fish, which are not included in the scope of said statute, and there is one particular stream which is specifically excepted from the operation of said statute. It is true that the legislature in its wisdom has the power to regulate the fishing industry in this state, and it is equally true that the judiciary will not attempt to encroach upon the broad powers of those servants of the people, but it appears to us equally true that our court will carefully inspect any law which is special and local in its operation, and which is hostile to the spirit of our organic law. A glance at the map of Oregon will clearly show that there are a large number of good-sized streams and lakes in this state which are not within the scope of that statute, and we believe that every member of the court knows, *experte crede* that there is not a stream emptying into the Pacific Ocean but has salmon in it. In fact salmon are wont to inhabit the smaller streams in preference to the larger streams for the purpose of propagation.

“True, our court has held that a law may be local in its operation and yet not repugnant to the organic law, if it affects all equally who come within range of the same, but we believe that our Constitution was made to cover a broader field than that indicated by such decisions. For instance, I have in mind the waters of Devils Lake in the Salmon River country of Lincoln County. There, certain citizens are allowed to fish for salmon (and there are a great number of salmon in said lake and in the neighboring streams) in a manner absolutely prohibited under Chap. 49, Laws 1915, which in the Siletz River, only four miles south, citizens are compelled to fish in conformity to said laws. X owns property adjoining said lake, and near and adjoin-

ing his property is a valuable fishing hole. That property is increased in value because of the valuable fishing rights connected with the same. On the other hand, Y owns property on the Siletz River, and adjoining his property is an equally valuable fishing hole. Because of said statute, in the former case, X can set a fixed trap or set-net clear across said fishing hole, and gather all the fish in the same, while Y, because of said statute, cannot do the same thing. We ask whether X and Y are treated alike under the law? There may be cases where on broad grounds of public policy, the legislature can "make meat of one and fish of another," but there must be some very good and cogent reason for the same. They should not be allowed to do so for the purpose of benefiting any one locality or any one class of citizens."

This argument, while plausible, assumes (1) that the law limiting the use of certain fishing appliances, applies only to the citizens residing in the vicinity of the stream to which the act applies, which is incorrect. If a citizen of Harney County desires to engage in fishing in the waters of Hoquarton Slough, or in any of the restricted waters, he is as much at liberty to do so on the one hand, and that liberty is as much restricted on the other, as if he resided upon the banks of the stream. So far as it concerns the person who engages in fishing, it is general in its application to every person so engaged.

The argument also ignores the repeated decisions of our own and other courts, that nobody has an absolute right to fish in the waters of this state; that the property in fish, abounding in the waters of this state, so far as they can be said to be property, is in the state in trust for the people, and, so long as it does not discriminate between citizens, the

legislature may prescribe the time in which and the method by which the fish may be taken, and the waters from which they may be taken. As the Lord said, "Ye shall not eat of every tree of the garden," so the state may say: "You shall not fish in every stream in the state." The restriction, in its substance, does not apply to the water or the locality of the stream, but the fish that abound therein. It is the command of the *quasi* proprietor, designating upon what terms its property shall be enjoyed—by the citizen and by every citizen upon the same terms.

Take the comparison used by counsel between Devils Lake and the Siletz River, both assumed to abound in salmon, the waters of the first being unrestricted and the second subject to the restrictions of the act. Any citizen of the state may take fish from Devils Lake, if he chooses, and any citizen may take fish from the Siletz River, if he chooses, upon the terms prescribed by the law. It is true that it might be more convenient for the citizens residing on the shores of the Siletz to take salmon from that stream, than from Devils Lake; but the state is not bound to consult the convenience of parties who wish to take its fish from its waters, although in justice to the framers of the law, the writer, who is familiar with most of the streams mentioned in the act, will say it appears to him that the legislature made an approximately fair classification, and that in fact salmon in numbers sufficient to make the waters of Devils Lake commercially of importance, do not abound there, while they do so abound in the Siletz River and its tributaries; but whether or not he is mistaken in this is of no importance.

The counsel, we think, also errs in assuming that the act in question is a local law for the punishment

of crimes and misdemeanors. In discussing this branch of the question it should be borne in mind, that there is no *general* inhibition of local legislation to be found in our Constitution. Such legislation is forbidden as to particular subjects expressly enumerated, but among these subjects the protection of fish and game does not appear. So it would hardly be contended if the legislature, instead of providing a penalty by way of fine or imprisonment, had ordained that any person fishing contrary to the provisions of the act, could be restrained by injunction or some like civil procedure, that the act would be unconstitutional. The sole ground upon which its constitutionality is assailed is the fact that a criminal penalty is attached to its violation.

To this argument we cannot accede. We are of the opinion that the intent of the Constitution was to prevent a discrimination as to the punishment of the same crime in different localities; that is to say, the legislature cannot say that it shall be grand larceny to steal a horse in Yamhill County, and petty larceny in Marion County, and no crime at all in Polk County, or that a person convicted of larceny from the person in Marion County shall be punished by imprisonment in the county jail, while the same offense committed in Multnomah County shall be punished by imprisonment in the penitentiary, although as we shall presently show, a similar law had been declared by the New York Court of Appeals not to be a local law.

We quote Mr. Binney's definition of a local law, italicizing a phrase to which we shall presently advert:

"A local law is one whose operation is confined within territorial limits, other than those of the whole state, or *any properly constituted class of*

localities therein.” Binney on Special Legislation, p. 26.

This definition might be enlarged so as to include within its terms a requirement that the law, if confined to territorial limits less than the whole state, should, in addition to proper classification, affect equally every citizen of the state coming or being within the classified area.

To hold that a law, providing a classification thus based, is a local law, would be to destroy our whole system enacted for the protection of migrating fish. Take the act of 1915 now being considered. The Columbia River at Astoria is seven miles in width. Now it is obvious that a law which would permit a fisherman on a narrow body of water, like the Hoquarton Slough, to extend a set-net one third of the way across the stream, as he must to catch any considerable number of fish would be wholly inapplicable to the Columbia River, where drift-nets are used as a rule and set-nets the exception.

We may also take judicial notice of the fact that many, if not all, of the streams along the coast south of the Columbia River are narrow, tortious, snaggy and incapable of being fished to any great extent with drift-nets, and that if they are to yield salmon to capacity, set-nets should be permitted. We may also take judicial notice of the habit of salmon to return to the stream where they were spawned, so it is obvious that set-nets should be regulated that a single net may not entirely obstruct the passage of fish to the spawning grounds, and that such regulation is also necessary in order that the taking of fish may not be monopolized by one or a very few fishermen.

Any attempt to enact a law without classification, which will apply to all streams frequented by salmon and thereby protect the industry, must of necessity be abortive because of the above and other dissimilar conditions well known to all fishermen, and the courts of this state have therefore tacitly, if not expressly, recognized the right of the legislature to adopt reasonable classification of streams for the protection of the industry.

In *State v. McGuire*, 24 Or. 366 (33 Pac. 666, 21 L. R. A. 478), the defendant was indicted for having in possession fish taken during the closed season. The indictment was in pursuance of a statute, passed in 1893 (Session Laws 1893, p. 145), which made it unlawful to take or have in possession salmon caught in certain streams therein designated during the closed season. The classification was no broader than the case at bar, and, while the court did not expressly consider the question as to whether or not the statute was local, it passed unchallenged.

In *Portland Fish Co. v. Benson*, 56 Or. 147 (108 Pac. 122), the law providing for a closed season was upheld, no question being made as to its being special or local, although the kindred subject of its being discriminating was discussed, Mr. Justice EAKIN saying:

“Where the stream is open, it is open to everybody, and there is no discrimination or spoliation of property. A law that operates only in a limited territory to accomplish a specific purpose does not deny equal protection of the laws, as it affects all persons equally and impartially who are similarly situated.”

In short, while the exact question here discussed has never been formally passed upon up to the case of *State v. Savage*, ante, p. 53 (184 Pac. 567), acts of a similar character have been accepted by the

courts and acted upon for many years. But upon similar statutes relating to other subjects we are not without precedent in our own courts.

In *Ladd v. Holmes*, 40 Or. 167 (66 Pac. 714, 91 Am. St. Rep. 457), the court had under consideration an act providing rules for conducting primary elections in incorporated cities containing more than ten thousand inhabitants. Portland was the only city so qualified at the time. It was argued by the plaintiff that the act was unconstitutional in two respects: (1) That it violated Article IV, Section 23, subdivision 13, of the Constitution, which forbade the passage of special or local laws concerning the conduct of election; and (2) that it violated subdivision 2 of the same section, in that it prescribed a fine and imprisonment for violations of certain provisions of the law. The court held, as to the first specification, that a law classifying cities according to population was not a local law, and as to the second contention, it was held that the offenses described in the statute were mere creatures of and incident to the act, and the act being general, the punishment was properly provided.

In *State v. Savage*, *ante*, p. 53 (184 Pac. 567), Mr. Justice BEAN announces the same rule in passing upon an act for the protection of crabs in Coos County, saying:

“Section 5360, L. O. L., is not such a special or local law as comes within the inhibition of Article IV, Section 23 of the Constitution, for the reason it provides for the punishment as a misdemeanor for a violation of its provisions, as that is merely incident to the act. If the legislature can enact a law for the protection of fish and game in a certain section or part of the state, then it follows that the law may be enforced by the punishment of a violation thereof.”

The question is not new to the courts of other states: *Doughty v. Conover*, 42 N. J. Law, 193, is a case in point. This cause arose upon a prosecution of one Doughty for unlawfully fishing with a net in the waters of Burlington and Atlantic. The statute read:

“ * * That it shall not be lawful for any person or persons to put, place or haul any gill, drift or other net at any time whatever, for the taking or catching of fish, between the first day of June and the first day of September, in any of the waters of Burlington and Atlantic”: Laws N. J. 1878, p. 396, § 2.

This was objected to as a local law, and under certain sections of the New Jersey Constitution, void for that reason. Mr. Chief Justice BEASLEY said:

“The provision thus arraigned interdicts the fishing with a net of a certain description, during a designated part of the year, ‘in any of the waters of the counties of Burlington and Atlantic,’ and the contention is that, as the operation of the clause is thus confined, the enactment is local, and consequently is out of harmony with one of the prohibitions in the fourth *placitum* of section 7 of the amended Constitution. The clause thus drawn in question declares that ‘no general law shall embrace any provision of a private, special or local character.’ But it seems to me very obvious that this restrictive injunction does not apply to such a law as the one under consideration. A law is not necessarily of a special or local character because it prohibits the doing of a thing in a certain locality. If this were so, a law regulating the use of the public roads of the state, and imposing penalties for the infringement of such rules, would be illegitimate, as such a law would be local, in the sense that it prohibited the doing of certain acts in particular localities, to wit: within the bounds of the public highways. I do not see how a law can be said to have

a special or local character, that does not confer either a particular benefit, or does not impose a particular burthen upon the inhabitants of a designated place or district. It is very plain that the law in question is free from such characteristics. It is entitled 'An Act for the preservation of fish,' and its purpose is to regulate throughout the state this public interest. The operation of the statute is as broad as the subject to be regulated, for it extends its adjustments to all the waters under the dominion of the state, and when it imposes the restrictions in the second clause, which is the one under criticism, such burthens are laid not only upon the inhabitants of the two counties that are mentioned, but upon all the citizens of the state. In short, this act dealt with a matter of general concern, and it put a restraint upon everybody; it is not, therefore, special or local in its character."

The above case is in all substantial respects parallel to the case at bar.

Another case exactly in point is *State v. Corson*, 67 N. J. Law, 178 (50 Atl. 780), in which the defendant was indicted for violation of a statute entitled:

"An act for the better regulation and control of the taking, planting and cultivating of oysters on lands lying under tidal waters of the Delaware Bay and Maurice River cove, in the State of New Jersey."

At page 189 of the opinion of 67 N. J. Law (50 Atl. 785), Mr. Justice GUMMERE said:

"A statute is not special or local merely because it authorizes or prohibits the doing of a thing in a certain locality. It is, notwithstanding this fact, a general law, if it applies to all the citizens of the state and deals with a matter of general concern. * * The application of this principle led this court, in the case cited, to the conclusion that a statutory provision which made it unlawful for any person to net fish during certain periods of the year 'in the

waters of Burlington and Atlantic' was not special or local, but general. The act before us, tested by this rule, is also general. Although it deals with the lands of the state under tide water only in certain localities, the matters which it regulates are of general, not local, concern. The lands themselves belong to the people of the state, not to the citizens of the counties where they are located.

"Nor is there any selection, by the act, of favored individuals as the recipients of the state's liberality to the exclusion of other citizens. Every citizen is eligible to take a lease of these lands for the purposes to which they are appropriated by the act, when he has been such for a period of twelve months next before the lease is made, and has also been a resident of the state during that time; and no citizen can enjoy this privilege until his citizenship and residence has continued for the period mentioned."

Burnham v. Webster, 5 Mass. 266, *Commonwealth v. McCurdy*, 5 Mass. 324, and *Harper v. Galloway*, 58 Fla. 255 (51 South. 226, 19 Ann. Cas. 235, 2 L. R. A. (N. S.) 794), are like in principle to the case at bar.

These are all fishing cases, but, if we go into decisions generally defining and explaining the meaning of the term "local legislation," abundant authority may be found supporting the constitutionality of laws applicable to particular localities, but general in their application to all persons coming within such localities.

In *Williams v. People*, 24 N. Y. 405, the contention arose upon the validity of a statute, which prescribed a greater penalty for larceny from the person—if committed in the City of New York—than that prescribed for the same crime, if committed elsewhere in the state. The argument was made on behalf of the defendant that the act was local, and

therefore in violation of the provisions of the Constitution relating to local legislation. Concerning this objection the court said:

“I am of the opinion that the thirty-third section, which provides for an increased punishment for petit larceny, when committed by stealing from the person, in the City of New York, is not local within the meaning of the Constitution. It has, no doubt, features which savor of locality, for it punishes a well-known common-law offense more severely, if committed under peculiar circumstances within the limits of that city, than if committed elsewhere. But it prescribes the rule of conduct for all persons, whether residents of the city or of any other part of the state, and its increased penalties are intended to protect residents of other localities equally with inhabitants of the city; and it was probably intended especially for the security of strangers and sojourners, who are apt to lack the habitual caution of permanent citizens of large towns. Offenders when convicted are to be imprisoned in one of the prisons of the state out of the city, and to be provided for at the expense of the state at large; and the disqualification which attaches to a convict under the act affects him wherever he may be in this state. I cannot think that a statute having such consequences is to be classed with special provisions making appropriations for particular roads, public buildings, or the like, situated in particular local divisions. Upon this point, I concur with the views expressed in the opinion given in the Supreme Court.”

The ruling was followed in *People v. Davis*, 61 Barb. (N. Y.) 456, and in *Bretz v. Mayor etc.*, 6 Rob. (29 N. Y. Super. Ct.) 325, and other cases.

The question here discussed has recently been exhaustively briefed, and the subject of an elaborate opinion by Mr. Justice BEAN in *State v. Savage*, ante, p. 53 (184 Pac. 567), and to that opinion we still

adhere, notwithstanding the able argument of counsel for the appellant upon the rehearing. Many authorities might be cited which take a contrary view. Indeed, these equal, if they do not exceed, in number those cited as sustaining the views herein expressed; but an application of them to the situation in this state lead to the absurd consequence that it would be utterly impossible, by an act applying generally to all the streams in the state, to give any adequate protection to the fishing industry of the state.

4. It is needless to say that the fishing interest is of large importance in the industries of Oregon. The production of cereals at present brings in a greater gross income, but involves a gradual decrease in the fertility of the soil. The sheep and cattle raising industry is a great income producer, but with each succeeding year the pastures are denuded and in some localities they tend to approach a condition of barrenness. Not so the fishing industry. The unharvested sea is its pasture, and at trifling expense, comparatively, it can be maintained forever in its original productiveness, and has brought and is still bringing into the state millions of dollars annually, the greater part of which is "clear gain." These conditions, added to the legal considerations above set forth, should make courts cautious in reversing the policy of many years, and by a narrow construction of constitutional provisions to declare the legislation now on our statute books violative of our fundamental law, and thereby throw into hopeless confusion that system of legislation which, while far from perfect in detail, has sufficed to maintain the integrity of a great industry.

The constitutional objections being disposed of we recur to the other objections urged.

5, 6. The first has reference to the sufficiency of the complaint. It is claimed that the complaint was so drawn as to apply either to the offense denounced by Chap. 49, Laws 1915, *supra*; or to Chap. 362, Laws 1917, before quoted, the offense under the first of these statutes being within the jurisdiction of a justice of the peace to punish, while under the latter statute the justice has only jurisdiction to commit the defendant for trial in the Circuit Court. The transcript is incomplete as to what occurred in the Justice's Court, no record of these proceedings appearing here, but, as this defect could be supplied, we assume the statement in defendant's brief to be correct, for the purpose of this opinion, from which we gather that there was indorsed on the complaint the words: "Sec. 1, Chap. 362, Laws 1917. For penalty, Chap. 31, Laws 1919."

A demurrer was interposed for the reasons: (1) That the court had no jurisdiction to try the case; and (2) that the complaint did not state facts sufficient to constitute a crime. This demurrer being overruled, the brief states, and we assume the fact to be, that the district attorney, by leave of the court, scratched out the indorsement above noted and made the following indorsement: "Sec. 1, Chap. 49, Laws 1915. For penalty, Chap. 31, Laws 1919."

Upon appeal the same demurrer was interposed, and was overruled. The demurrer did not raise the question discussed here, which is that the complaint stated two offenses and was therefore indefinite as to the particular offense charged, or that the complaint charged more than one crime. That objection could only have been raised by a demurrer

under Section 1491, L. O. L., subds. 2 or 3. The indorsements on the complaint were not required by law and amounted to nothing for any purpose. The defendant pleaded not guilty and was tried and sentenced to pay a fine of \$100 in the Justice's Court, and it sufficiently appears that he was tried for the offense described by Section 5257, L. O. L., as amended by Chap. 49, Laws 1915.

7, 8. It is also claimed that there is no evidence that defendant was operating a set-net. The evidence indicates that Hoquarton Slough is a tidal tributary to Tillamook Bay; that on the occasion of the arrest of defendant he was found about midnight, and at low-water slack, with a gill-net fastened at one end to a snag and extending more than two thirds of the distance across the stream, then making an acute angle back across the stream, and back and across again at another angle to defendant's boat, thus giving the general appearance of three nets, each extending more than two thirds of the way across the stream. The defendant claimed to be washing his net, but the state's witnesses saw no appearance of washing, and he took in the net immediately after they accosted him.

A drift-net is a net with both ends free to drift with the current. A set-net is one fastened at one or both ends, so the whole net cannot drift with the current, and, notwithstanding this, be in a condition to take fish. In the slack condition of the water at the time of the alleged offense, the manner in which the net was fastened made it just as capable of taking fish as if both ends had been made fast. The jury was the judge, under the circumstances detailed, as to whether defendant's statement, that he

was washing his net was true, and it evidently rejected that theory.

The judgment of the lower court is affirmed.

AFFIRMED.

BEAN, JOHNS and BENNETT, JJ., concur.

Argued July 9, affirmed September 9, 1919, rehearing denied April 27, 1920.

**COFFEY v. NORTHWESTERN HOSPITAL
ASSN.***

(183 Pac. 762; 189 Pac. 407.)

Evidence—Presumption of Receipt of Mailed Letter.

1. There is a strong presumption that a letter or postal card marked and addressed to defendant, and mailed by plaintiff, was received by the defendant, and whether this presumption was overcome by defendant's evidence was a question of fact for the jury.

[As to the presumption of the receipt of letter, see note in Ann. Cas. 1917E, 1058. As to rebuttal of the presumption of receipt of letter, see notes in 4 Ann. Cas. 956; Ann. Cas. 1912D, 1065.]

Contracts—On Refusal of Hospital Treatment Under Contract Another Request Unnecessary.

2. Where defendant hospital association, which had contracted to furnish medical, surgical, and hospital service to plaintiff in case of illness, in replying to plaintiff's request for care and service virtually refused to treat plaintiff on the ground that her disease was chronic, and not subject to treatment under the contract, plaintiff was relieved from making further requests for treatment.

Contracts—Whether Plaintiff had Chronic Disease Within Contract for Treatment, for Jury.

3. In an action for breach of a contract to render plaintiff medical and surgical treatment and furnish hospital facilities whether plaintiff's ailment was chronic, and therefore not covered by the contract, was a question of fact for the jury, a chronic dis-

*On mental suffering as element of damages against physician or surgeon, see note in 51 L. R. A. (N. S.) 36. **REPORTER.**

ease being one of long duration, or characterized by slowly progressive symptoms.

Contracts—Failure to Pay Assessment not Breach of Contract.

4. In an action for breach of a contract to furnish medical and hospital services, the fact that plaintiff did not pay an assessment when due is immaterial, where the contract provided that "no cancellation of membership shall be made while the member is sick," and plaintiff was ill at such time.

Contracts—Limiting Place for Furnishing Medical Services not Authorized by Contract.

5. In an action for breach of a contract by defendant hospital association to furnish free hospital services where a hospital is provided, and free medical and surgical treatment, without specification as to place to be rendered, *held*, that an instruction that, under the terms and conditions of the contract, defendant was not bound to render services to plaintiff outside of the city and county in which defendant hospital was located was properly refused.

ON PETITION FOR REHEARING.

Damages—Inference of Physical Suffering from Nonperformance of Contract for Medical Services Held Justified.

6. The fact of plaintiff's speedy relief when finally she was able to get medical assistance *held* to justify inference that she suffered physical pain through nonperformance by defendant of its contract to furnish her medical and hospital service.

Damages—Mental Suffering With Physical Pain Element of Damage.

7. Mental anguish concomitant with physical pain suffered through breach of contract to furnish medical and hospital service is an element of damages.

Damages—Mental Suffering as Element of Damage Held Within Contemplation of Parties to Contract for Medical Care.

8. That a resort to charity, with accompanying humiliation and mental anguish, might result to plaintiff from failure of defendant to keep its contract to furnish plaintiff medical and hospital services in case of sickness was a contingency naturally within the contemplation of both parties.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

This is an action for breach of a contract to furnish plaintiff medical and surgical services in case of illness. The terms of the contract, or policy, so far as they relate to this case, are as follows:

cer, and the Association is under no obligations to treat any of said troubles or diseases. * *

“Article X. The Association may cancel this agreement at any time by a written notice served upon the member personally to that effect, or by letter sent by registered mail to her address, for just and due reasons, and by returning to said member the balance of any monthly fees paid, but no cancellation of membership shall be made while the member is sick, or under treatment by the Association, for any reason.

“Article XI. Notice of the injury or illness of any member must be given to the association as soon as possible after the inception of such illness or injury, if the member deems such illness or injury of sufficient importance to need treatment.

“Article XII. No erasures nor changes in this agreement or waiver of any of its agreements, shall be valid, unless added hereto in writing and signed by the President and Secretary of the Association, and the Association will not be bound by any lawful statements of any kind or nature.”

The plaintiff paid her first dues and received her contract on October 15, 1911, and on October 25, 1915, became sick at Eugene, Oregon, and sent a postal card by mail to defendant at Portland, Oregon, stating that fact and demanding treatment. The card was not replied to and defendant's officers and agents testify that it was never received. On November 4, 1915, plaintiff wrote to defendant as follows:

“N. W. Hospital Assn.,

“Portland, Oregon.

“Early in the week I sent an imperative call for help. I am sick and have no money for medicine or doctor. Have been in bed almost a week. It is a shame you have allowed me to lay and suffer without making any effort to assist me. If this is your care of the sick away from home I don't care to

spend anything more on my membership. I am a very sick woman and needing help. You have entirely ignored my card and call for help.

"MRS. COFFEY,
"No. 116 E. 9th St., Eugene, Ore.
"I want to hear at once."

On November 5th, defendant wrote as follows:

"Portland, November 5, 1915.
"Mrs. C. W. Coffey,
"116 East 9th St.,
"Eugene, Oregon.
"Dear Madam:
"We are in receipt of your letter of the 4th inst., and in reply will say that we did not receive a card from you, therefore do not have any idea what is the matter with you.
"We do not have doctors at Eugene, but if there is anything we can do for you from this office, we will gladly do so. Or if you care to come to Portland we will take care of you.
"Yours very truly,
"NORTHWESTERN HOSPITAL ASSN.,
"By R. C. POWELL, Manager."

On November 15th plaintiff caused her daughter to write the following letter to Dr. W. E. Stewart, who was the principal physician of the defendant.

"Eugene, Ore., Nov. 15, 1915.
"Dr. W. E. Stewart,
"Dear Sir and Friend:
"I am writing this for mamma. She has been lying in bed very sick for two weeks. Has suffered intensely but has not called a doctor because she has no means. Could not sit up long enough to write to you. Today she *had* to call a doctor for an examination. I will tell you how she has suffered, what grandma has done for home nursing, and lastly, what the doctor said.
"Mama has been working in a department store here, and has been doing her own house work. She

was out of bed at six-thirty and never retired until eleven. On her feet continuously all those hours. The store work was very hard; stooping and bending all that time. Last week she suffered untold agony with her left side. At the close of the week she went home and to bed. The left ovary was so painful she could not stand the weight of the hand on it. Could not relax the sphincter muscle for a bowel movement without screaming. Could not urinate without intense pain, and getting down on her hands and knees. All night long she was bathed in perspiration, even her hands being soaking wet. She had no appetite. Grandma is here. She placed hot fomentations of turpentine over the left ovary, first thoroughly cleansing her bowels, later giving Captogen tablets. During the time her monthly period came. She had been having a bad discharge all the time and taking salt douches for it. Taking her cleansing douche after her monthly, upon removing the douche point found it covered with pus. Since then her napkins has been daily covered with pus. Pain around the rectum and vagina simply maddening.

"To day Dr. Scaife, of Eugene, made an examination and found her in a terrible shape. He says the left tube is pusy, and ovary and tube will have to be removed. Says he is very fearful of peritonitis. Uterus is out. He packed her with cotton and melierne, gave her two kinds of medicine to take, one a capsule the other a liquid, taken alternately every one and one-half hours. Told her he would do what he could but did not encourage her. She asked when she would go back to work and he told her 'Not at all.' She will have to be operated on. Mr. Powell wrote her last week to come home and the N. W. H. A. would take care of her. She wants *you* to attend to the operation yourself. Arrange with the Good Samaritan Hospital and get a bed in Ward H. H. Get arrangements made and let us know at once. Mama will go straight from train to hospital.

“Trusting that everything has been made plain and that we will hear from you at once, I am,

“Your truly,

“MRS. L. E. HENIKA.

“Address, Mrs. C. W. Coffey,

“Apt. 6, 116 E. 9th St.,

“Eugene, Ore.

“P. S.—Doctor says the perspiration is caused by toxine poisoning from the pus, and would be very serious if the perspiration should stop.

“V. H.”

To which defendant answered as follows:

“November 16, 1915.

“Mrs. C. W. Coffee,

“116 East 9th St.,

“Eugene, Oregon.

“Dear Madam:

“Your letter to Dr. W. E. Stewart was referred to me and in reply will say that you have been examined by our physicians for this condition, and upon their advice I will inform you that this condition has been chronic with you for some years before entering the Hospital Association, and does not come under our contract; however, if you desire to come to Portland and have our doctors examine you, and if it is a case that comes under the Hospital Association's contract, we will be glad to take care of you.

“Yours very truly,

“NORTHWESTERN HOSPITAL ASSN.,

“By R. C. POWELL, Manager.”

On November 26, 1915, plaintiff wrote inclosing dues from November 15th to December 15th, and on the 27th the money was returned with a note stating the plaintiff's contract had been canceled for non-payment of dues. On February 9, 1916, plaintiff brought this action, alleging compliance on her part with all the conditions of the contract and failure and refusal on the part of the defendant, after no-

tice and request, to furnish the necessary medical, surgical and hospital services, as required by the contract. The complaint further alleged that plaintiff had been unable to procure such services elsewhere and that by reason thereof the plaintiff had been damaged in the sum of \$750, which she claimed was the reasonable cost and value of the medical, surgical and hospital services necessary to treat and cure plaintiff of her sickness and disease. Then follows the following allegation:

“That notwithstanding the defendant was informed and well knew at the time plaintiff entered into the aforesaid contract with the defendant, that in entering into the aforesaid agreement with defendant, plaintiff was providing herself with expert medical services in event plaintiff became afflicted with sickness or disease in the future, and to protect and prevent herself from becoming an object of charity in such event, and, notwithstanding, that at the time plaintiff notified defendant of her said sickness, as aforesaid, defendant was informed and well knew that plaintiff was wholly without money or funds, and was unable to secure the money or funds with which to procure medical, surgical and hospital services to treat her aforesaid sickness and disease, said defendant failed and refused to give, furnish or render plaintiff with medical, surgical and hospital services, as aforesaid, and by reason thereof plaintiff was compelled to make application to the County Court of Lane County, Oregon, for medical and surgical services and also for hospital services to treat her said sickness and relieve herself from bodily pain and suffering, but the County Court of Lane County refused to give plaintiff said medical services for the reason that plaintiff had not been a resident of Lane County for six months prior to her aforesaid application for said services, and by reason thereof plaintiff has been unable to procure treatment for her said disease and sickness and relieve herself from bodily pain and suffering and

has thereby sustained and does now sustain great bodily suffering, humiliation and mental anguish, to her damage in the further sum of \$2,000.”

The complaint concludes with a prayer for \$2,750 damages.

Defendant answered, admitting its corporate capacity and the execution of the contract, denying that plaintiff had paid her monthly assessments and dues as therein stipulated; denied on information and belief the allegations as to plaintiff's sickness, and denied generally every other allegation of the complaint, except the allegation that it had canceled the contract.

For a further and separate defense defendant alleged that it had at all times been ready and willing to take care of plaintiff, in strict accordance with its contract, but that plaintiff never applied for treatment at Portland, Oregon, and that if she had been sick and needed treatment she never notified defendant, and the defendant did not know she was sick and needed treatment in Portland, Oregon; that about the fifteenth day of November, 1915, plaintiff wrote from Eugene, or caused a letter to be written by her daughter, stating that plaintiff was sick and needed treatment, and the association immediately, and on November 16, 1915, wrote plaintiff that if she would come to Portland and have the hospital doctors examine her, and her sickness was such as came within the terms of their contract with her, the defendant would be glad to take care of her. Plaintiff wrote some two or three letters from Eugene, but was informed that the defendant had no doctors in Eugene and that if she wanted an examination and if necessary treatment, she must come to Portland, Oregon, where defendant was prepared to take

care of its members, but defendant alleges that it has not heard from said plaintiff since November 27, 1915, and the plaintiff was then in Eugene, and this defendant had no knowledge that plaintiff had come to Portland until served with the papers in this action; that plaintiff well knew that the defendant could not and would not treat her at Eugene, as she states in paragraph "V" of her complaint, and she was accordingly notified of that fact and requested to come to Portland, and the association would take care of her, but that she never did call for help in any way at Portland, Oregon, but began this action without having first demanded treatment at Portland, Oregon; that plaintiff failed, neglected and refused to make her monthly payment for dues for the month ending November 15, 1915, and her contract with the association was thereby terminated, canceled and annulled, and plaintiff was so notified in writing that her policy was canceled and annulled, and that at the time said notice was so given the plaintiff she was not under treatment by defendant.

The new matter being put at issue by an appropriate reply, the case came to trial and there was a verdict and judgment for plaintiff for \$1,500, from which defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. C. D. Christensen*.

For respondent there was a brief and an oral argument by *Mr. William P. Lord*.

McBRIDE, C. J.—1. Plaintiff's evidence tended to show that she was taken sick, as alleged in the complaint, and that she mailed a card to defendant, as alleged. There is a strong presumption that a let-

ter so marked was received, and whether this presumption was overcome by the evidence of defendant was a question of fact for the jury. The receipt of the letter of November 15th is admitted by defendant, in which the condition of the plaintiff was fully described, and there is no question raised in the testimony that it was not substantially a correct statement of her condition.

2. The reply was substantially a refusal to treat her under the contract for the disease under which she was suffering, upon the ground that it was chronic and therefore not within the contract. It said in effect, "Your disease is chronic and not subject to treatment under our contract, but come down and if we find it is not chronic we will treat you." No person in plaintiff's then condition would have gone after having been informed that if she had the sickness which she claimed to have had she would not be treated. Defendant claimed, then, claimed at the trial, and claims here that plaintiff was afflicted with a chronic disease which it was not required to treat, and it is plain that if she had gone to defendant after receiving this letter it would have declined to treat her. If the trouble was, in fact, a chronic one, defendant was justified; otherwise, its refusal was a breach of the contract which renders it liable in damages.

3. The evidence introduced as to the disease from which plaintiff was suffering indicates that in 1910 plaintiff suffered from prolapsus uteri, and that as a result of an operation she was completely cured of that trouble and was in sound health when she became a party to the contract with defendant; that this condition continued for about two and a half years; that later, when plaintiff did hard work or lift-

ing, she had temporary prolapsus, but that her condition, always becomes normal upon ceasing such work. The effect of plaintiff's testimony is, that she has had frequent attacks or recurrences of the trouble at intervals, produced by overwork or lifting, but that the trouble is not continuous. The evidence on behalf of plaintiff indicates that she is much more susceptible to attacks of this character than the ordinary woman, but this fact alone does not render the disease chronic.

It is a fact well known even to laymen that there are persons whose bones are so brittle from disease or malnutrition, that they are broken by blows or falls which would do no particular injury to a person whose bones are normal; but it does not follow that such persons have chronic broken arms or legs. Some persons are poisoned by the slightest contact with poison ivy while others are not at all affected by it; but it does not follow that the susceptible person is afflicted with chronic ivy poisoning.

It appears here that plaintiff's first attack was cured in three weeks by an operation; that she remained in good health for over two years, and that subsequent attacks were cured by avoiding the causes which produced them. A chronic disease is one of long duration or characterized by slowly progressive symptoms: Section 2, Words & Phrases, "Chronic." Whether plaintiff's ailment was chronic was a question of fact for the jury, who were instructed in substance that the burden of proof was upon the plaintiff to show that she was not suffering from a chronic ailment.

4. The fact that plaintiff did not pay her assessment due on November 15th is immaterial, as Article X of the contract provides that "No cancellation

of Membership shall be made while the member is sick, or under treatment by the association, for any reasons."

5. It is urged the court erred in not giving the following instruction requested by defendant:

"You are further instructed that under the terms and conditions of the contract herein the defendant was not bound to render any services to the plaintiff outside of the City of Portland, Multnomah County, Oregon."

It is a forced construction of the contract to say that it requires defendant to render services in the City of Portland only. Article I of the contract stipulates for furnishing hospital services "where provided," by which we understand that such services were to be rendered only where the defendant had provided hospitals; but Article II provides for medical or surgical services by any one of the physicians of the association staff, and does not limit such services to a place where hospitals have been provided. Three things are promised the members of the association: (1) Free hospital service where a hospital is provided; (2) free medical treatment without any specification as to where it is to be rendered, and (3) free surgical treatment under the same conditions. In addition to this defendant had practically refused to treat plaintiff for prolapsus anywhere, and had unlawfully canceled its contract with her while she was sick, so it is in no position to claim immunity because plaintiff did not come to Portland to receive their refusal to treat her. Plaintiff's final demand was for treatment in Portland, coupled with an offer to come to Portland to be treated. Defendant's response was a refusal to treat her in Portland for the disease from which

she was suffering, coupled with a crafty invitation to come and be examined and treated, in case defendant found that she was afflicted with some different ailment than that from which she claimed to be suffering; and with the assumption that if she were suffering from the ailment described in her communication, she would not be entitled to the treatment stipulated in the contract.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

BURNETT, BENSON and HARRIS, JJ., concur.

Denied April 27, 1920.

PETITION FOR REHEARING.

(189 Pac. 407.)

This is a petition for rehearing.

It is contended that the court failed to pass upon the question of the measure of damages argued in defendant's original brief, and in an able and plausible brief accompanying the petition for rehearing, defendant makes the point that a mere breach of the contract set forth in the complaint, even if unjustifiable, would not of itself authorize plaintiff to recover for physical pain and mental anguish, because, in addition to showing such breach, she would be required to show that she suffered physical pain as a consequence thereof, and not in consequence of the disease.

Defendant's argument is best stated in the following excerpts from the brief on petition for rehearing:

“I want to point out to the court that nowhere in the complaint is there an allegation to that effect and there is not one scintilla of evidence upon the point. Mrs. Coffey testified that she had suffered great pain, but it is clear that she suffered this pain, not because of the breach of the contract, but because of the trouble with which she was afflicted. No physician was placed on the stand to show that it was possible in any way to allay her suffering. In fact, it is clear from the testimony of Dr. Leonard that there was nothing that would have relieved the plaintiff outside of an operation, and that rest and lying in bed was the only treatment that could otherwise be administered.

“Assuming, further, for the sake of argument that the plaintiff has shown that the defendant breached the contract, the defendant should not, and could not legally be asked to respond in damages beyond an amount naturally flowing from the breach, and which is justified by the evidence. To permit a recovery on any other ground is a violation of all the established rules of law and evidence, and has the effect to judicially outlaw the appellant. We can see no reason why any different rule should apply in this case than in any other similar contract action.”

REHEARING DENIED.

Mr. C. D. Christensen, for the petition.

Mr. William P. Lord, contra.

McBRIDE, C. J.—It may be conceded, for the purposes of this case, that in the absence of any evidence tending to show that plaintiff's sufferings were prolonged by defendant's breach of its contract, she would not be permitted to recover for physical pain resulting as a necessary consequence of the disease, irrespective of such breach. In other words, if plaintiff suffered to no greater extent than she would, had defendant promptly treated her,

then she can recover nothing for such physical pain. But that is not this case.

In spite of a very rigorous rule adopted by the court, in excluding testimony in regard to plaintiff's treatment in Eugene, there is evidence tending to show that upon being taken sick she promptly notified defendant by postal card, and received no answer; that thereupon she called in a local physician, who gave her two or three cursory treatments, found her unable to pay for said treatments, and turned her over to the county physician, who, after a treatment or two, discontinued his calls, for reasons which the court refused to permit to be shown, but which may reasonably be attributed to the fact that she had been in Lane County but six weeks and was therefore not a proper pauper charge upon the county. During this time she was asking the defendant for the treatment which she was entitled to but was not receiving. When in February, 1916, she managed in some way to get to Portland and obtain medical assistance, she was speedily relieved of much of her pain and suffering and substantially cured of her trouble.

6, 7. These facts were evidence from which a jury might infer, and almost necessarily would infer, that a prompt compliance by the association with the request of plaintiff for treatment would have saved her unnecessary suffering. So there is evidence that plaintiff suffered physical pain by reason of the nonperformance by defendant of its contract. And where this exists, a recovery for mental anguish concomitant with the physical pain suffered, is a proper element of plaintiff's damages.

The case cited by defendant's counsel, *Adams v. Brosius*, 69 Or. 513 (139 Pac. 729, 51 L. R. A. (N. S.) 36), does not even remotely sustain defendant's con-

tention. In that case the plaintiff Adams had called upon defendant Brosius to attend upon his wife, who was suffering from a hemorrhage, caused by a miscarriage, and was in a dangerous condition. Brosius accepted the call, and started on his journey to the home of the sick woman, but stopped on the way and failed to keep the engagement. The woman died from the hemorrhage, and her husband brought suit against the physician for damages, alleging, as the sole ground of recovery, the anguish caused by the failure of the defendant to attend as he had promised. There was no allegation that Mrs. Adams' death was caused by failure of the physician to attend, or that by his failure to do so her life was shortened or her sufferings were increased; the only injury complained of being the mental anguish of the husband caused by the breach of the physician's contract.

The case was reduced down to the proposition as to whether one could recover damages for mental anguish, caused by viewing the physical suffering of another, where such person had himself suffered no physical pain or damage. We held that he could not, but Justice McNABY added, by way of *dictum*:

"Had death not claimed her for its victim, plaintiff's wife possibly could have maintained an action against defendant for the mental anguish and physical pain, if any, which she sustained as a result of the broken contract, but for plaintiff no action is maintainable for purely mental distress."

This indicates that there was in the judicial mind in that case the distinction which we have endeavored to make here, between damages for an act causing mental anguish only, and one where such mental suffering is accompanied by physical pain.

In cases of this character the basis of the action is a contract, but an action for the breach of such

It seems in fact - damages for mental s. are allowed &

contract sounds in tort, and authorities are not lacking to the effect that in such actions damages for mental suffering are recoverable. *Galveston etc. R. R. Co. v. Rubio* (Tex. Civ. App.), 65 S. W. 1126, is a case exactly in point with the one at bar. See, also, *Aaron v. Ward*, 203 N. Y. 351 (96 N. E. 736, 38 L. R. A. (N. S.) 204); *Austro-American S. S. Co. v. Thomas*, 248 Fed. 231, L. R. A. 1918D, 873, 160 C. C. A. 309).

Upon other features of defendant's contention in this case and holding adversely thereto, see *McDaniel v. United Rys. Co.*, 165 Mo. App. 678 (148 S. W. 464).

The general principle is well summed up in 3 Sutherland on Damages, Section 980, in the following language:

"The best reconsideration we have been able to give the subject of damages for mental injury, that reconsideration being had with the result of the cases decided since the original edition of this work was prepared in mind, confirms the conclusion then arrived at—given a cause of action on contract or for a tort, the allowance of damages on that account depends on the same rule by which they are allowed for any other resulting injury, namely, in an action *ex contractu* the injury to the feelings must be such as was presumably contemplated by the parties as likely to occur at the time it was made, if a breach resulted; and in an action of tort it must be the natural and proximate consequence of the wrong. In both cases the act or omission which constitutes the cause of action must in some way result in a deprivation of comfort, produce annoyance, personal inconvenience, wound the sensibilities by indignity or something like it, as distinguished from a sense of disappointment on being denied money due or a commodity for business purposes. The objections to the allowance of compensation for such injury are largely based upon reluctance to

opening to juries an inquiry as to an indefinite wrong for which there is no precise measure of reparation, thus making possible an award due to passion and prejudice. But when injury of this character is contemplated as likely to result from the breach of a contract the parties may, when they make their agreement, liquidate the damages; if they do not, the party at fault is not entitled to immunity merely because there is danger that a jury may require him to pay too much. This consideration is still more potent in tort actions."

8. We are of the opinion that the damages suffered here may be fairly said to have been within the contemplation of the parties when the contract was executed.

It is a well-known fact that as a rule these contracts are not entered into by the wealthy or well-to-do class of the community, but by that poorer class who seek thereby to provide themselves with medical or surgical assistance in case of sickness or accident, without resort to humiliating public or private charity. That a resort to such charity might result from a failure of defendant to keep its contract, was a contingency which would naturally be within the contemplation of both parties. That being compelled to resort to it for the meager assistance it usually affords would be a source of humiliation and mental anguish to a woman of average sensibilities, who for years had paid a monthly premium to avoid such a contingency, goes without saying.

The verdict and judgment were legally and morally right, and the former opinion is adhered to and the petition for rehearing denied.

AFFIRMED. REHEARING DENIED.

BURNETT, HARRIS and BENSON, JJ., concur.

Argued February 25, affirmed March 16, rehearing denied April 27, 1920.

CAMPBELL v. COIN MACH. MFG. CO.

(188 Pac. 197.)

Corporations—Subscribers to Stock Liable to Pay on Express or Implied Promise.

1. Persons subscribing to the capital stock in a corporation are obligated to pay therefor when regularly required to do so, and the taking of stock without subscription implies a promise to pay.

Corporations—Reduction of Capital Stock by Reducing Par Value of Shares Entitled Subscriber to Rescind and Recover Money Paid.

2. Where plaintiff agreed to purchase five shares of treasury stock of defendant corporation of a par value of \$100 a share, defendant's capital stock consisting of \$4,000,000, divided into 40,000 shares, and thereafter defendant reduced its stock to \$400,000, consisting of 40,000 shares of a par value of \$10, defendant thereby voluntarily put it out of its power to perform, and is liable for the money paid.

From Multnomah: **JOHN P. KAVANAUGH, Judge.**

Department 2.

This is an action to recover the sum of \$375. After the defendant filed its answer, plaintiff moved for a judgment upon the facts as admitted, which was granted. Defendant appeals.

The defendant was a corporation with a capital stock of \$4,000,000, divided into 40,000 shares of the par value of \$100 each. On June 21, 1915, defendant, Coin Machine Manufacturing Company, an Oregon corporation, entered into a written contract with plaintiff, John F. Campbell, by the terms of which the company agreed to sell to Campbell, who agreed to purchase, "five shares of the treasury stock of the party of the first part of the par value of \$100 per share, fully paid, and nonassessable," for the sum of \$500, \$100 of which was paid in cash

at the date of the contract and the balance was to be paid in installments of \$25 per month. It was further agreed that, "when full payment shall have been received," the company would cause to be executed and delivered to Campbell "certificate or certificates, in due and regular form, evidencing the shares of stock so purchased and paid for." Campbell made his installment payments to the company, including the monthly payment due on the thirty-first day of May, 1916. In May, 1916, before the plaintiff completed his payments or became a stockholder in the corporation, without plaintiff's consent, the defendant corporation reduced its capital stock from \$4,000,000 to \$400,000, consisting of 40,000 shares, which it decreased the par value of from \$100 to \$10.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Platt & Platt*, with an oral argument by *Mr. Harrison G. Platt*.

For respondent there was a brief over the name of *Messrs. Beach, Simon & Nelson*, with an oral argument by *Mr. Roscoe C. Nelson*.

BEAN, J.—Plaintiff contends that the corporation thereby placed itself in a position whereby it was unable to carry out the terms of its contract, and therefore he sued for the money paid to defendant on the contract.

It is the contention of defendant that there has been no material change in the stock which is the subject matter of the contract, and that plaintiff's proportionate interest in the assets of the corporation has not been changed, and that his right to ac-

quire a certain voting power as a stockholder in the corporation has not been altered.

It is stated in the brief of the learned counsel for defendant that the question raised in the present case has not so far as they can discover been directly passed upon in any reported case of the United States.

Mr. Thompson, in his work on Private Corporations (2 ed.), Section 3450, describes "shares of stock" as:

"The right to participate, in a certain proportion, in the immunities and benefits of the corporation, to vote in the choice of their officers, and the management of their concerns, and to share in the dividends or profits, and to receive an aliquot part of the proceeds of the capital, on winding up and terminating the active existence and operations of the corporation."

The same author, in Section 3436, describes treasury stock:

"Treasury stock is issued and outstanding stock that has come into possession of the corporation which issued it by purchase, donation, or in liquidation of a debt. If it has been issued full-paid, it remains so, even if sold again below par, and it is considered an asset of the corporation for book-keeping purposes. * * "

In 1 Cook on Corporations (7 ed.), Section 8, we find the following:

"Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders, for the prosecution of the business of the corporation and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation."

Section 199 of the same volume reads, in part, as follows:

“The capital or capital stock of a corporation is the aggregate of the par value of all the shares into which the capital is divided upon the incorporation; it is the fund or resource with which the corporation is enabled to act and transact its business, and upon the faith of which persons give credit to the corporation and become corporate creditors.”

Section 6683, subdivision 5, L. O. L., provides:

“That the articles of incorporation shall specify the amount of each share of such capital stock.”

Section 6687, L. O. L., requires that in the organization of a corporation at least one half of the capital stock shall be subscribed before its directors are elected. Article XI, Section 3, of the Constitution of Oregon reads thus:

“The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more.”

Section 5833, L. O. L., is of the same purport. Section 6701, L. O. L., as amended by Laws of 1913, p. 465, authorizes a corporation by a vote of the majority of the stock of the corporation to increase or diminish its capital stock or the amount of the shares thereof, and authorizes the dissolution of such corporation.

At the date of the contract the defendant company had in its possession certain shares of treasury stock of the par value of \$100 per share, from which fact it is assumed that such shares were originally subscribed and paid for at the rate of \$100 per share. These shares, being treasury stock, are assets of the corporation which it could enter into a contract to sell.

It is stated in defendant's brief as follows:

"Each share represented a one forty-thousandth part interest in the particular enterprise for which the company was incorporated.

"Each share would give to the purchaser the right to cast one out of 40,000 votes upon any resolution presented to a meeting of the stockholders thereof, after he acquired title to the shares.

"Each share would give to him the same proportionate right to dividends declared and to profits earned and surplus provided for."

And further, in effect, that by the same token it would make him a proportionate loser in any decrease of the assets of the corporation; that five shares of capital stock of the par value of \$10 per share, after the reduction of the capital stock of the corporation, would give the plaintiff the same right as five shares of the par value of \$100 each before such decrease.

On the other hand, the plaintiff asserts, in substance, that, he having contracted for five shares of the capital stock of the par value of \$100 in a corporation with a capital stock of \$4,000,000, that it would not be a fulfillment of the contract for the defendant to deliver to him five shares of the capital stock of the par value of \$10 each in a corporation with a capital stock of \$400,000; and that the plaintiff has voluntarily put it out of its power to perform its contract, quoting Bishop on Contracts (2 enlarged edition) Section 1426:

"If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived."

Plaintiff cites: *Branson v. Oregonian Ry. Co.*, 10 Or. 278; *Krebs v. Livesley*, 59 Or. 574 (114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758), and *Colgan v. Farmers' etc. Bank*, 59 Or. 469 (106 Pac. 1134, 114 Pac. 460, 117 Pac. 807).

1. The general rule is, as provided by our statute, that persons subscribing for the capital stock in a corporation are obligated to pay therefor when regularly required to do so. The taking of certificates of stock without subscription implies a promise to pay for them: 4 Thompson on Corporations, § 3458; *Shickle v. Watts*, 94 Mo. 410 (7 S. W. 274); *Chouteau v. Dean*, 7 Mo. App. 210; *Van Cott v. Van Brunt*, 2 Abb. N. C. (N. Y.) 283.

Looking at the matter from one viewpoint, the decreasing of the capital stock was equivalent to the cancellation of \$3,600,000 of the capital stock.

It is stated in 4 Thompson on Corporations (2 ed.), Section 3459:

“A solvent corporation has the right by vote of its stockholders to cancel stock subscribed but not paid for where existing creditors are not prejudiced thereby. And the corporation would have the right to cancel in this way where certificates are either void or voidable because of illegality in their issue, or it could reach the same end more regularly through a suit in equity to have the certificates declared void and canceled and their transfer enjoined. The money received for the stock must be returned.”

2. As the learned counsel do not find precedents for a guide, let us look at the matter from a practical standpoint. The plaintiff contracted to invest \$500 in the corporation with a capital stock of \$4,000,000 or to furnish one eight-thousandth part of the capital.

The defendant proposes to plaintiff that he shall invest \$500 in a corporation with a capital stock of \$400,000 or furnish one eight-hundredth part of the capital.

Let us suppose that the company had made a second reduction in the capital stock of the same proportion as the one made and reduced the capital stock to \$40,000 and the par value of the shares to \$1 per share. According to the contention of the defendant the plaintiff's aliquot part would be the same, but he would be paying \$500 for five shares of capital stock of the par value of \$1 each, and investing one-eightieth part of the amount of the capital.

A still further reduction upon the same principle as that made by the corporation might be supposed, reducing the capital stock to \$4,000 and the par value of each share to ten cents per share, which would require the plaintiff to invest one-eighth part of the capital stock of the concern. Under this last supposed condition each share of the capital stock would give the purchaser the right to cast one out of 40,000 votes at a meeting of the stockholders and each share would give the holder the same proportionate right to dividends declared and profits earned as the shares described in the contract.

It seems to us that the decrease in the capital stock and the change in the amount of capitalization admitted to have been made by the defendant company without the plaintiff's consent, and without his having a right to participate in such transactions, changed the corporation from a strong concern having a capital of \$4,000,000 or at least one half thereof, if only one half of the capital stock was

subscribed, so that the corporation now is a smaller and weaker one with only one tenth as much capital stock as the one in which the plaintiff contracted to participate. It is apparent that the organization is changed; also, plaintiff's proportion of the amount of capital to be put into the concern is changed. In the ordinary course of business, parties subscribing to stock in the company after the reduction would be required to pay only \$10 per share for the same kind of stock that plaintiff would pay \$100 per share for if his contract is now enforced.

The five shares of capital stock of the par value of \$10 proposed to be delivered to plaintiff by defendant would not comply with defendant's contract to deliver to plaintiff five shares of capital stock of the par value of \$100 each in a corporation with a capital stock of \$4,000,000. The plaintiff might desire to pledge his shares of stock as security for a loan, or he might desire to sell the same; and, to tersely express it, it would be entirely different stock. To present five shares of stock of the par value of \$10 each in a corporation with a capital stock of \$400,000 for a pledge, or sale upon the market, would be entirely different from an offer as a pledge or for sale of five shares of stock of the par value of \$100 in a corporation with a capital stock of \$4,000,000.

A stockholder is not only interested in participating in the business of the corporation as a stockholder and receiving dividends and profits or sharing in their losses, but is interested in the amount of capital to be used and the ability of the corporation to engage in large undertakings in order that there may be profits to divide.

At the time of the suit the defendant was voluntarily in a position where it could not perform its contract. It should therefore return the money paid to it by plaintiff.

It follows that the judgment of the lower court is affirmed. AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued February 26, affirmed March 23, rehearing denied April 27, 1920.

ELMIRA LUMBER CO. v. OWEN.

(188 Pac. 415.)

**Bills and Notes—Release from Liability for Breach of Contract
Good Consideration, Despite Impossibility of Performing
Contract.**

1. Where sellers of timber agreed to obtain the purchaser a right of way for a logging road over the land of another, to commence negotiations therefor at once, and use their best efforts to acquire such right at a reasonable price by grant or agreement, and if unable to do that within a reasonable time to organize a corporation and institute an action to acquire such easements by the right of eminent domain, the sellers cannot maintain that there was not a good consideration for a note given to relieve them of their liability under the contract on the ground that the contract was impossible of performance, in the absence of a showing that they used their best efforts to procure such right of way, by agreement or grant or otherwise, or that they organized a corporation or instituted an action to acquire it through eminent domain.

**Contracts—Mere Impossibility of Execution by Promisor no Excuse
for Failure to Perform.**

2. To excuse performance of a valid and lawful contract made upon a sufficient consideration, it must appear obviously impossible of performance in the nature of things by anyone; mere impossibility of execution by the promisor not being enough.

From Lane: **GEORGE F. SKIPWORTH, Judge.**

Department 2.

This action is founded upon a joint and several promissory note for the sum of \$574, payable six months after date, with interest at 6 per cent per annum, executed by defendants to the plaintiff on April 4, 1916, of which it is alleged that the plaintiff is the owner and holder, and that no part thereof has been paid.

For answer defendants admit that the plaintiff is a corporation, the execution of the note as alleged, and that plaintiff is the owner and holder thereof, but deny that any part of it is due or owing. As an affirmative defense defendants plead a contract, executed on July 31, 1915, between the First National Bank of Eugene, Oregon, party of the first part; Sarah E. Owen and B. J. Owen, her husband (defendants herein), parties of the second part; Joseph Aubel and Robert Reeves, parties of the third part; and the Elmira Lumber Company, a corporation of Oregon (plaintiff herein), party of the fourth part. It was therein recited that the party of the first part agreed to sell and the party of the fourth part agreed to purchase upon the terms therein stated, "all of the green growing merchantable fir and cedar saw timber fourteen (14) inches or over in diameter at the base, measured four (4) feet from the ground, suitable for manufacture into logs" upon a certain tract of land of 187.81 acres in section 2, township 18 S., R. 7 W., W. M., in Lane County, Oregon. By the terms of the contract the plaintiff had five years from date thereof in which to cut, log and remove the timber, with a privilege of erecting a sawmill on the premises. The agreed purchase price was \$1.50 per thousand feet, log measure. The contract provided that:

"It is further understood and agreed between the respective parties hereto that it is absolutely necessary to the performance of this agreement by the party of the fourth part that said party shall have a right of way to build, maintain and operate a logging road, skid road, railroad or flumeway, as it shall elect, over and across the east half of the southwest quarter of section 2, township 18, south, range 7 west of the Willamette Meridian," and that the route should be selected by the plaintiff.

The parties of the second part, Sarah E. and B. J. Owen, did—

"Covenant and agree to obtain and furnish for the use of the fourth party within a reasonable time as hereinafter more particularly specified, a right of way for such logging road, skid road, railroad or flumeway as the fourth party may elect," and without charge or cost to them except that it should pay "the reasonable value for all merchantable timber cut or used in building or maintaining such road or flume."

The Owens agreed to negotiate for the right of way at once, "and use their best efforts to acquire the same by agreement and grant at a reasonable price," and in the event that they were thereby unable to procure such easement they were then to organize a corporation and obtain it through the right of eminent domain for the use and benefit of the plaintiff during the life of the contract. It was further provided that—

Should they "fail within a reasonable time to acquire said rights and easements either by grant or by the exercise of the right of eminent domain, as aforesaid, and furnish the same to the fourth party, then the fourth party shall be entitled at its election to organize such corporation and acquire or attempt to acquire said rights and easements at the proper charge and expense of the second parties."

In the event of a delay of more than six months in acquiring such rights and easements, provision was then made for extending the period of the contract and payments thereunder, and further that:

“In the event of the failure of the second party to acquire such rights and easements and furnish the same to the fourth party within a reasonable time, the fourth party shall have the right to cancel and terminate this contract.”

The contract recites that—

The party of the first part, the First National Bank of Eugene, “Is acting in a representative capacity only, and that none of the covenants and agreements herein shall be personally binding upon the first party, but that any covenant and agreement of the first party herein made shall be deemed to be the personal covenant and obligation of the second parties.”

Defendants further allege that—

The contract was illegal and void; that plaintiff had no right or claim against the defendants; and that plaintiff, “by making false and fraudulent claims under said contract, coerced these defendants into the execution of the said note, based upon the pretended consideration of the release of said contract, when as a matter of fact the said contract was illegal and void.”

As a second affirmative defense it is alleged that the note was executed under certain threats, founded upon false and illegal claims as to the rights of the plaintiff under the contract, which were made to defendant. Hyland and the plaintiff knew to be null and void.

After filing its reply the plaintiff obtained leave of court to withdraw that pleading, and then filed the following demurrer:

"Comes now the plaintiff and demurs to each and all of the further and separate answers and defenses set up in the amended answer of defendants for the reason that none thereof state facts sufficient to constitute a defense."

After argument the court sustained the demurrer and the defendants refused to plead further.

It was stipulated that \$50 was reasonable attorneys' fees, and the court entered judgment against the defendants as prayed for in the complaint, from which they appealed.

AFFIRMED.

For appellants there was a brief over the names of *Mr. C. M. Kissinger* and *Mr. O. H. Foster*, with an oral argument by *Mr. Kissinger*.

For respondent there was a brief over the name of *Messrs. Smith & Bryson*, with an oral argument by *Mr. E. R. Bryson*.

JOHNS, J.—The contract was made between the four different parties therein on July 31, 1915. The note was executed on April 4, 1916, and defendant Hyland was not a party to the contract. While the agreement says that the First National Bank of Eugene contracted to sell to the plaintiff the standing and growing timber upon the 187-acre tract of land, it further appears that the bank was acting "in a representative capacity only," and that it was not personally bound, "but that any covenant and agreement of the first party herein made (which was the bank) shall be deemed to be the personal covenant and obligation of the second parties," Sarah E. and B. J. Owen, defendants herein.

In other words, it was those defendants who contracted with the plaintiff to sell the timber upon the

tract of land in question, to furnish it "the right to go over and across said lands or any part thereof * * for the purpose of cutting, logging and removing said timber," and "to erect and maintain suitable logging camps upon said premises," to use "other than merchantable saw timber upon said premises for fuel purposes without charge," and to construct a sawmill thereon "and to use the necessary space thereabout for millyards." The purchase price was "one dollar and fifty cents (\$1.50) per thousand feet, log measure." While the amount or value of the timber does not appear from the contract, it does provide that when the right of way is acquired and becomes available for the plaintiff that it shall then execute to the bank its certain promissory notes aggregating \$2,000.

As a further consideration for the contract the defendants B. J. and Sarah E. Owen did covenant and agree, at their own expense and within a reasonable time and for the use and benefit of the plaintiff, that they would procure a right of way for a logging road, railroad or flume over and across the east half of the southwest quarter of section 2, township 18 S., R. 7 W., W. M.; that they would commence negotiations therefor at once, and use their best efforts to acquire such rights at a reasonable price by grant or agreement; and that, should they not be able to do so within a reasonable time, they would organize a corporation and institute an action to acquire such easements by the right of eminent domain.

While it is not specifically alleged, it does appear from the defendants' first further and separate answer that the true consideration of the note sued upon was a release to the defendants from all of

their liability arising from and growing out of the contract.

The defendants claim that in the circumstances they could not acquire such rights by eminent domain or other legal proceedings; that the contract was impossible of performance, and that such facts were known to the plaintiff at the time it took and executed the promissory note, and for such reason it was null and void and without consideration.

1. Assuming all the facts to be true as alleged, they would not constitute a defense. There is no allegation in the answer that the defendants, within a reasonable time or ever, used their best or any efforts to procure such right of way by agreement or grant or otherwise, or that they organized a corporation and instituted an action to acquire it through eminent domain. In fact, there is no allegation that such defendants made any effort whatever to acquire such easements.

Their sole defense is the impossibility of performance. For aught that appears in the answer defendants could have acquired such rights through friendly negotiations with the owners of the land, or even through the right of eminent domain. Under the facts alleged, the breach of the contract was a sufficient consideration for the note.

2. The law of the instant case is settled by the decision of this court in *Reid v. Alaska Packing Co.*, 43 Or. 429 (73 Pac. 337), in which the *syllabus* lays down the rule that:

“To excuse performance of a valid and lawful contract, made upon a sufficient consideration, it must appear obviously impossible of performance in the nature of things by anyone; mere impossibility of execution by the promisor is not enough.”

In the opinion it is said at page 436 of 43 Or., at page 339 of 73 Pac.:

“The rule to be deduced from the authorities is that, if one enters into a valid contract, for a sufficient consideration, to do a lawful thing, possible in itself * * —that is, in the nature of things—to be done, he must either carry out the contract according to its terms or answer in damages for a failure to do so. The mere impossibility of performance in fact will not be enough, but the contract must be obviously impossible upon its face before such a defense can be made.”

Upon any theory of the case the demurrer should have been sustained. The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued February 17, affirmed March 30, rehearing denied April 27, 1920.

MOORE v. MOORE.

(188 Pac. 696.)

Evidence—Statements of Ancestor Admissible Against Heir Claiming Under Him by Descent.

1. Statement of deceased on supplementary proceedings against him, that he had settled with his partners and received all his interest in the partnership, is admissible against his heir suing for a partnership accounting, under the rule that when admissions of an ancestor would be admissible against him, if living, they are admissible against an heir claiming under him by descent.

From Multnomah: **JOHN P. KAVANAUGH, Judge.**

Department 1.

This is a suit for an accounting of a partnership. The essential elements of the complaint are as follows:

Walter H. Moore died on December 15, 1913, leaving as his heirs a son, the plaintiff, two grandchildren, the offspring of a deceased daughter, and his widow, the defendant Laura H. Moore. On January 8, 1917, the plaintiff was appointed administrator of the estate of Walter H. Moore, and was thereafter appointed administrator of the partnership estate. Walter H. Moore and the defendant H. A. Moore were brothers, and defendants Laura H. Moore and America Moore are the wives, respectively, of the two brothers, Laura H. being the stepmother of the plaintiff. The complaint avers that certain properties described therein are the partnership properties of Moore Brothers, and seeks to have them so declared and to secure an accounting from the defendant H. A. Moore. The property consists of farm lands in Eastern Oregon, city property in Portland and Vancouver, Washington, corporation stock, bills receivable and other assets; the legal title to some of the partnership properties having been transferred to the defendants Laura H. and America Moore in trust for the partnership.

The defendants filed a joint answer in which they admit the partnership, but allege that it was dissolved prior to the year 1913 (August 30, 1907), and that all of the interest of Walter H. Moore in the partnership property was at that time disposed of by him, a portion being transferred to Thomas C. Devlin, receiver, and the remainder he agreed to transfer to the defendants H. A., Laura H., and America Moore. The defendants deny that Walter H. Moore had any interest in any of the properties at the time of his death. The answer also pleads four affirmative defenses: First, that all of the property standing in the name of the Moore Investment

Company is the property of that corporation, and that all of the stock of the Moore Investment Company and the Moore Realty Company belongs to the persons in whose names the same now stands, and that Walter H. Moore has not had any interest in such property since 1907 or 1908. Second, that in June, 1913, certain judgments were entered and docketed in the Circuit Court for Multnomah County, against Walter H. Moore and in favor of Thomas C. Devlin, as receiver of the Oregon Bank & Trust Company, aggregating about \$60,000, upon which executions were returned to the effect that no property had been found, and thereafter, upon proceedings supplementary to execution Walter H. Moore was at various times examined as to whether he had any property subject to execution, and testified that he had no property whatever, and thereafter, by reason of the intimate relationship of these defendants with Walter H. Moore, they agreed with the receiver to convey to him certain properties belonging to them in full satisfaction of such judgments, so far as they affected Walter H. Moore, and the agreement was fully carried out, although these defendants were not parties to the judgments and under no legal obligation to pay them. Third, that for a number of years prior to 1907, Walter H. Moore was president of the Oregon Bank & Trust Company, which, in the fall of 1907, became unable to meet its obligations, and Thomas C. Devlin was appointed its receiver; that various transactions of Walter H. Moore in connection therewith were severely criticised and it was asserted that large losses had occurred through his misconduct, and he was desirous of making such restitution as lay in his power, so he proposed to the defendants that

he should withdraw all of his interests in the partnership and convey the same to Devlin for the benefit of the bank, and they assenting to this, joined him in conveyances of certain property to Devlin, which property, it was agreed, included all of his interest in the partnership, and that in consideration of such action, Walter H. Moore conveyed or agreed to convey to defendants all his interest in the residue of the partnership assets, and such agreement was afterward fully carried out. The fourth affirmative defense refers to community property acquired by the husbands and their wives in the State of Washington.

A reply joined issue with the affirmative answers and a trial was had, resulting in a decree dismissing the suit and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Bartlett Cole*.

For respondents there was a brief and an oral argument by *Mr. Jay Bowerman*.

BENSON, J.—1. There is but one ultimate issue in this case. Did Walter H. Moore, at the time of his death, have any beneficial interest in the partnership wherein the plaintiff now seeks an accounting?

The transcript of the testimony is exceedingly voluminous, covering a wide range, discussing a series of transactions extending through a period of many years. A detailed analysis of this evidence would be impracticable and unprofitable. Briefly stated, it appears that the two brothers and their wives, starting together with an insignificant amount of property, by industry and thrift became quite

prosperous. After making their home at Moro for many years, they transferred their activities to the City of Portland, where they engaged in numerous enterprises, consisting principally of real estate transactions. During this time Walter H. Moore became president of the Oregon Bank & Trust Company, and in 1907, through mismanagement of its affairs, the bank became involved in financial difficulties, was unable to meet its obligations, and Thomas C. Devlin was appointed receiver, and thereafter began two suits against the officers of the bank to recover certain sums of money which it was alleged had been misappropriated by them. In these suits H. A. Moore was joined as a defendant, upon the theory that he was an officer of the bank. In these suits there were decrees for the plaintiff in large sums of money, which, upon appeal to this court were modified as to the amount of the recovery, and dismissed as to H. A. Moore, it being conclusively determined that he had no interest in or connection with the bank: *Devlin v. Moore*, 64 Or. 433 (130 Pac. 35); *Id.*, 64 Or. 464 (130 Pac. 46).

From the time of the failure of the bank, Walter H. Moore as president, was severely criticised for his connection with the disaster, a fact which caused him great distress, and according to the testimony of H. A. Moore, America Moore and Laura H. Moore, who, with Walter H., constituted the partnership known as Moore Brothers, Walter H. proposed to the other members of the firm that, being desirous of making such restitution as lay in his power, he wanted them to convey to him such portion of the firm's assets as would represent his interest therein, so that he might in turn convey the same to Devlin for the benefit of the bank. They were reluctant to

do this, contending that they were in no way responsible for the failure or the obligations arising therefrom. However, they finally yielded to his importunities and made the necessary conveyances of their interest in properties which were accepted by Devlin at a valuation of \$115,900. In consideration of such action upon their part, Walter H. from time to time made conveyance to them of his interest in the remaining assets and at the time of his death had parted with all of his interest in the firm. In addition to the positive testimony of the surviving members of the partnership, the record discloses that when execution had been issued upon certain judgments against Walter H. Moore, arising out of the bank failure, such executions were returned *nulla bona*, and supplementary proceedings were instituted against Walter H. Moore, wherein, upon being examined upon oath as to his having any property subject to execution, he testified that he did not have a dollar in money or property, and had no interest in any property then in the possession of any other person. He then narrated the circumstances of the conveyance by the defendants of the property received by Devlin, substantially as recited by the defendants, saying:

“I took the proposition up a day or two after bank closed, to turn in property to stand good for any deficit that might come from the bank paying the depositors, but they didn't want to do that; didn't feel that they had any right to do it, and didn't believe that it was their place to do it; but I stood by my convictions, and after probably a week they decided to do that, if I would agree to give up my interest in the other property.”

He further testified that the conveyances were made by them as agreed, and that subsequently,

from time to time, he made conveyances to them of his interest in the remaining property, and had no further interest in the assets.

Plaintiff urges that the statements so made by Walter H. Moore are not competent evidence, and cannot be considered in this proceeding, basing his contention upon the assumption that the evidence is admissible only by virtue of Section 710, L. O. L., which reads thus:

“The declaration, act, or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.”

Plaintiff's theory is that at the time the decedent testified as above set out, such declarations were not against his interest, but, on the contrary, were made with the purpose of protecting himself and family from the consequences of what he considered unjust judgments. We might, perhaps, dispose of this proposition by remarking that the statements of the deceased themselves constitute refutation of the theory that they were designed to serve the declarant's financial interests, and, on the contrary, indicate a desire to disregard his pecuniary interest, in response to an exalted desire to clear his good name from suspicion, and to make restitution for an unintentional wrong. However, we are of opinion that the statements of Walter H. Moore are competent evidence, without relying upon the provisions of Section 710, L. O. L. The authorities recognize two classes of statements of decedents which may under certain circumstances become competent evidence in subsequent litigation. The distinction between these two groups may be best expressed by quotations

from Jones on Evidence (2 ed.), in Section 323 of which we find this language:

"In several of the preceding sections the discussion has related to the admissibility of declarations or entries made in the regular course of business and as part of the *res gestae*. In another chapter we discussed the admissibility of declarations of *parties* and those identified in interest with parties, that is, admissions. We now come to the consideration of an entirely different class of declarations, which should not be confused with those already mentioned; namely, declarations made by *strangers*, that is, by persons not in privity with the parties to the suit; declarations which are not necessarily made in the regular course of business, but which are received on the ground that they were *against the interest of such stranger* and *irrespective of the fact whether any privity exists* between the person who made them and the party against whom they are offered."

Turning now to Section 242 of the same volume, under the subtitle, "Admissions of ancestor against heir," we read this:

"The principle under discussion has often been applied in the admission of the declarations of ancestors as against their heirs. Stating the rule more broadly, it has been held that whenever the admissions of an ancestor would be admissible against him, if living, they are admissible against an heir claiming under him by descent, and are receivable in evidence against him in the same manner as they would have been receivable against the ancestor."

The distinction thus clearly announced is also recognized in Greenleaf on Evidence (16 ed.), Section 189, and 2 Wigmore on Evidence, Section 1081. It follows, therefore, that the admissions of Walter H. Moore are competent evidence, independent of

the provisions of Section 710, L. O. L. We have, therefore, the positive evidence of everyone concerned in the firm, that Walter H. Moore was not interested in the partnership at the time of his death. The other evidence in the case does not overcome the convincing power of this testimony.

We concur in the findings of the trial court and the decree is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

Submitted on briefs March 16, affirmed April 6, rehearing denied April 27, 1920:

LESSER v. PALLAY.*

(188 Pac. 718.)

Arbitration and Award—"Umpire" Defined.

1. A third person, chosen by two arbitrators who cannot agree, is not, in the strict sense, an umpire, unless he succeeds to the duties of those who have chosen him to accomplish that wherein they have failed, making the original arbitrators *functus officio*.

Arbitration and Award—Power of Two Arbitrators to Name Third not Exhausted by Single Nomination.

2. The power of arbitrators to select a third arbitrator or umpire on failing to agree is not necessarily exhausted by a single nomination, and was not exhausted where nominee died before having acted.

Arbitration and Award—Death of Umpire or Arbitrator Nominated Did not Exhaust Power to Nominate.

3. Where two arbitrators selected to partition land could not agree and named a third arbitrator, and the three investigated the land, and, after agreeing to meet on the following Monday, sepa-

*On the question of general right of revocation of submission, see note in 47 L. R. A. (N. S.) 400. **REPORTER.**

rated and the third arbitrator died on Sunday, there was no such performance or action by the third arbitrator as would preclude the arbitrators from naming a successor.

Arbitration and Award—Agreement of Submission Under Seal Revoked Only by Writing Under Seal.

4. The formality of a revocation of a submission of matters to arbitrators must conform to the formality of the submission, and if the submission is under seal, or by deed, the revocation must be under seal, and if the submission is in writing, the revocation must be in writing; a simple letter not being sufficient to revoke a submission under seal.

Arbitration and Award—No Necessity for Hearing by Arbitrators Whose Only Duty was to Divide Realty.

5. Arbitrators selected to divide realty between owners are not different from referees in partition, and where it was not contemplated that they should do anything more than to go upon the premises, survey the same, and divide the ground into three tracts in the manner stipulated, and make a report of their action, an award made by them was valid, although the parties were not given the opportunity to appear before them for a hearing.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

In Banc.

This is a suit to enforce the award of an arbitration, and for other relief. The facts as gleaned from the pleadings are, that on June 16, 1917, the plaintiffs and defendant Pallay were the joint owners of a tract of land lying partly in Multnomah and partly in Clackamas Counties, Pallay being the owner of an undivided two thirds, and Lesser and Lubliner being each the owner of an undivided one sixth thereof. The Security Savings & Trust Company holds the naked legal title in trust for the plaintiffs and defendant Pallay. Being desirous of having the lands partitioned so that each might hold his share in severalty, on the date above mentioned the parties entered into a written agreement, whereby plaintiffs named B. D. Sigler and Pallay named Frank E. Watkins as arbitrators to partition the lands, and providing that if they were unable to agree thereon, they were to select a third person to

act as umpire, and that an award of the arbitrators or of one of the arbitrators and the umpire should be conclusive and binding upon the parties. It was further agreed that upon the award being made, the defendant Security Savings & Trust Company should execute sufficient conveyances under the award. The contract of submission, being for the partition of real property, was drawn and executed with the formality of a deed, being under seal, with two witnesses to signatures, duly acknowledged before a notary and subsequently recorded in both Multnomah and Clackamas Counties. The two arbitrators, being unable to agree upon a division of the property, named George K. Clark to act as umpire in accordance with the terms of the submission, but before Clark had formally accepted the appointment, he suddenly died, and thereafter the two arbitrators selected David S. Stearns to act as umpire, and such selection was approved by plaintiffs and Pallay.

The board of arbitrators thus constituted proceeded to have the property surveyed, examined the same, and made a division thereof upon the ground, but Watkins, at the request of Pallay, declined to sign the award, and the same was signed by Sigler and Stearns, a majority of the board, on November 6, 1917. A copy of the contract of submission, and the award of the arbitrators are made a part of the complaint, the written report of the award being under seal, and acknowledged by the arbitrators, and duly recorded in both counties. Upon notice to it by Pallay that he repudiated the award, the defendant Security Savings & Trust Company declined to accede to the demand of plaintiffs for conveyances in accordance with the terms of the award, and Pallay refused to acknowledge any obligations thereunder.

There are further allegations in the complaint to the effect that Pallay has been in the exclusive possession and control of all of the land for more than two years, and is having cordwood cut and removed therefrom, and refuses to account to plaintiffs for their portion of the income of the property or for the cordwood which has been cut. The prayer seeks relief in accordance with the allegations.

The answer of Pallay admits the joint ownership of the property and the execution of the submission as alleged, admits the selection and subsequent death of George K. Clark, admits that he requested the trustee not to issue conveyances under the alleged award, and denies the other allegations of the complaint. It is then affirmatively averred that the arbitrators named in the contract, being unable to agree, selected Clark to act as umpire, and that he duly qualified, and the three attempted to reach a determination under the terms of the submission, but before it was reduced to writing, Clark died, and that Sigler and Watkins, in excess of their authority, selected Stearns as umpire, whereupon Pallay notified Watkins that he would not be bound by any award thereafter made, and Watkins resigned as arbitrator, before any decision was made, and that therefore the award is void. For a second defense defendant asserts that Sigler and Stearns fraudulently conspired, as agents of the plaintiffs, to make an *ex parte* award, without authority or consent of Pallay, to enrich plaintiffs by an unfair division at the expense of the defendant Pallay.

The answer of the Security Savings & Trust Company sets out the nature of its trust, and its readiness to perform as decreed by the court, and asks judgment for \$150 as reasonable compensation for its services as trustee.

A reply having been filed, there was a trial resulting in a decree affirming the award of the arbitrators, directing the specific performance of the contract, allowing compensation to the trustee, and allowing each plaintiff a specified sum as the rental value of his share of the land as occupied and enjoyed by defendant Pallay. The defendant Pallay appeals.

AFFIRMED.

For appellant there was a brief prepared and submitted by *Mr. Thomas Mannix*.

For respondents there was a brief submitted over the name of *Messrs. Teal, Minor & Winfree*.

BENSON, J.—1, 2. The appellant contends that the award is invalid for two reasons: (a) That since, under the terms of the written agreement, the third party to be chosen upon the failure of the two specified arbitrators to agree, was not to be the sole arbitrator, but was to act with the others in breaking the deadlock, he was not an umpire, but an arbitrator, and that the death of one of the arbitrators terminates the authority of all. In support of this doctrine our attention is directed to the case of *Blundell v. Brettargh*, 17 Ves. Jr. 231. The case cited is of no aid to us upon the question here presented, for the reason that in that case, it was not an arbitrator who died, but one of the parties to the contract of submission. It is true, as counsel for appellant contends, that the third person chosen by the arbitrators named in the contract was not, in the strict sense, an umpire, for an umpire is one who succeeds to the duties of those who, after failure to agree, have chosen him to accomplish that wherein they have failed, making the original arbi-

trators *functus officio*. By the terms of the submission, the third party chosen by the two referees named therein was to operate with the others in order to secure a majority, and was therefore what may be called a special arbitrator. It may be conceded for the purpose of this discussion, that if one of the arbitrators named in the written submission had died, or refused to act, before an award had been agreed upon, there could have been no award and the entire affair would have been thereby ended, since the personal participation of each was one of the express terms of the contract. The death of Mr. Clark, however, who was selected, not by signers of the agreement, but by the arbitrators themselves, presents a different question, since his failure to act did not have any effect upon the express terms of the written instrument, as would have been the case if such writing had named him as the umpire or special arbitrator. It is of no consequence to the present inquiry, whether we call him an umpire or an arbitrator, since under either title, or with the powers belonging to either title, his appointment is from the same source, the only difference being in the extent of his powers. Since he is to be chosen by the two arbitrators specified in the contract, their powers in the one case are logically the same as in the other. Upon this question, Morse on Arbitration and Award, page 245, says:

“The power of arbitrators to name an umpire is not necessarily exhausted by a single nomination. If the nominee refuse to accept, or neglect to act, successive nominations may be made, until someone is found who will actually exercise the function. The authority is determined only when it has been fully executed.”

An interesting discussion of this subject is found in the case of *Cloud v. Sledge*, 1 Bail. (S. C.) 105, wherein, under the terms of the submission, the two arbitrators, being unable to agree, named as umpire a Dr. Douglass, who, after an investigation of the matters presented, declared himself unable to arrive at a satisfactory conclusion, and recommended that a man named Gill should be called in as umpire in his stead, and this was done. Upon appeal it was urged that the powers of the arbitrators had been exhausted in appointing Dr. Douglass, but the court says:

“Formerly much strictness was required in the execution of the authority delegated to these domestic tribunals, but, as it was found to impede the determination of cases, and greatly to hinder and delay the administration of justice, this strictness has been relaxed; and if the arbitrators act in good faith, and the decision is fairly and impartially made, it is the inclination of the courts in all cases to support the award. The right of the arbitrators to appoint a second umpire, where the first has refused or declined to act, was once questioned, but it had long since been determined, that they have this power, and, indeed, it is somewhat surprising that it should ever have been questioned.”

The court in that case held that a successor to Dr. Douglass was properly selected. This ruling appears to be in accord with modern authority, and meets our approval.

3. As to whether or not Mr. Clark had assumed the duties of his task as an arbitrator, the record discloses that when notified of his selection, he accompanied Mr. Sigler and Mr. Watkins to the land in controversy, where they made some investigation and had some discussion as to what should be done, and then, after agreeing to meet on the following Mon-

day for further proceedings, they separated, and upon the intervening Sunday Mr. Clark died. There was here no such performance or action by Mr. Clark as would preclude the arbitrators from naming his successor.

4. (b) It is also contended by appellant, that even if it be conceded that Stearns was legally chosen to succeed Clark, the award is nevertheless void because Pallay gave notice of his revocation of the arbitration before any award was made or published. The evidence discloses that the three arbitrators together visited the ground, inspected it from various points, drew a plat disclosing the three tracts to be awarded, as agreed upon by all three; and then instead of making their report at once, they awaited the return of Mr. Winfree, then out of town, upon whom they relied to frame their report, looking to him, for the reason that he was the attorney who had prepared the contract of submission. While they were awaiting Winfree's return, and before their report was reduced to writing or signed, Mr. Pallay, by his attorney, notified the arbitrators by letter that he would not be bound by the award, and that he revoked the submission. Respondents urge that a revocation could not be thus accomplished, and their contention is undoubtedly correct. The formality of a revocation must conform to the formality of the submission. If the submission is under seal, or by deed, the revocation must be by deed. If the submission is in writing, the revocation must be in writing: Morse on Arbitration and Award, p. 232; 5 C. J., § 105, p. 57; 2 R. C. L., p. 368, § 17. It will be recalled that in the present instance the submission was by deed, and a simple letter, signed by either the appellant

or his attorney, is ineffective to accomplish a revocation.

5. It is urged, further, that the award is invalid for the reason that no opportunity was given to the parties to appear before the new board of arbitrators for a hearing, and among others, the case of *Cohn v. Wemme*, 47 Or. 146 (81 Pac. 981, 8 Ann. Cas. 508), is cited. This case, as well as the others which are relied upon by appellant, are cases which called for hearings and the introduction of evidence, while the case at bar is in an entirely different class. The written agreement of submission occupies the place of pleadings, stipulated facts, and an order appointing referees in a suit for partition of real property. The arbitrators are in no sense different from referees in such a suit in partition and it was not contemplated that they should do anything more than to go upon the premises, survey the same, and, in the exercise of their best judgment, divide the ground into three tracts in the manner stipulated, and make a report of their action. Such proceedings do not contemplate a hearing before the arbitrators, and the fact that there was no such hearing cannot affect the award.

We have carefully considered the entire record, and find that the award is fair and just, and the findings and decree of the trial court thereon, and upon the question of rentals, meet with our approval. The decree is therefore affirmed.

AFFIRMED. REHEARING DENIED.

Argued March 10, affirmed April 27, 1920.

NEIS v. EBBE.

(189 Pac. 417.)

Public Lands—Suspension Pending Investigation of Entry for Fraud Held a "Proceeding Against Entry" Barring Patent.

1. A homestead entryman's grantee held not entitled to a patent where the Secretary of the Interior had ordered the Commissioner of General Land Office to investigate the entry and such official had by order suspended it pending an investigation upon information of fraud, such action having been instituted within two years after issuance of patent to the original entryman, and constituting a proceeding against the entry within Act Cong. March 3, 1891 (U. S. Comp. Stats., §§ 5115, 5116).

Public Lands—Relinquishment and Proceedings Against Fraudulent Entry Held to Give Land Department Authority to Consider Land Vacant.

2. Where a final receipt had been issued to a homestead entryman and such entryman had granted the land to plaintiff, that the original entryman and plaintiff had relinquished and quitclaimed their interest to the government, which was investigating the entry and had suspended issuance of patent thereto on the ground of fraud, gave the Land Department authority to consider the land vacant, and to allow a homestead entry on the part of a third person.

Public Lands—Refusal to Allow Entry cannot be Taken Advantage of by One Who has Relinquished.

3. Where a homestead entryman's grantee after relinquishment by the original entryman and quitclaim by the grantee to the government procured others to apply for homestead entry on the land, the refusal of the government to allow such entry could not be taken advantage of by the original entryman's grantee nor reinvest him with any interest in the land.

Public Lands—Grantee of Original Entryman may Relinquish.

4. An original homestead entryman's grantee can relinquish his claim to the land to the government to the same extent as could the original entryman, and such relinquishment is authorized by the federal statute.

From Lincoln: JAMES W. HAMILTON, Judge.

Department 2.

The plaintiff brings this suit to have defendant, Mrs. Florence M. Ebbe, declared a trustee of a certain quarter-section of land for his use and benefit.

A patent to the land was issued from the United States to Florence M. Creitz, now Florence M. Ebbe. The trial court rendered a decree in favor of defendants, from which plaintiff appeals.

The plaintiff, Kola Neis, claims title to the land in question as grantee from George Rilea, who filed homestead entry under the laws of the United States for the tract, and on November 4, 1901, made final proof at the land office at Oregon City and received a final receipt therefor. Plaintiff asserts that there was no protest or contest filed against the homestead within the period of two years after the date of the final receipt.

The following facts appear from the record:

On October 1, 1900, George Rilea made homestead entry number 13,091, serial 0911, for the land involved herein. November 4, 1901, he made final proof therefor and a final certificate was issued to him. On July 22, 1902, Rilea executed a deed of the land to plaintiff Neis, which was duly recorded in Lincoln County, Oregon, July 25, 1902. On March 6, 1903, a special agent was instructed by the General Land Office to make investigation of all commuted homestead entries within certain townships, including the land in question. On March 26, 1903, all entries for this class of land were suspended by the General Land Office upon direction of the Secretary of the Interior. On August 19, 1903, Special Agent Hobbs made a report, which was received in the General Land Office August 25, 1903, reciting that he had investigated the entries in township 9 south, range 10 west, including this entry, and stating clearly that all of the entries were fraudulent. After still further investigation this special agent telegraphed the General Land Office on November 4, 1903, requesting that no patents be issued on home-

stead entries for this class of land. This all took place within the two-year period after the date of the final certificate issued to George Rilea. Afterward, by a written report dated November 9, 1903, the special agent presented formal specific charges against the entry of Rilea and other entries.

On July 10, 1909, the plaintiff and his wife executed a quitclaim deed to the United States, covering the land in question, which was delivered to Dye Wade under an agreement by which Wade was to file the relinquishment, secure a filing on the land if he could, and pay the plaintiff \$2,500 in case he secured a patent.

On August 31, 1909, Wade appeared at the office of the Register of the land office in Portland and filed this deed, together with a certified copy of the deed which plaintiff had secured from Rilea, the mortgage from Rilea to W. N. Jones, a satisfaction of the same mortgage, and a certificate of the county clerk of Lincoln County, Oregon, to the effect that the county records then showed the title to the land to be in the United States. Wade's application was rejected by the General Land Office February 25, 1911, which action was affirmed upon appeal to the Department of the Interior.

On April 10, 1907, George Rilea made a relinquishment of his rights in the land and at the same time one Gooch filed his application to make homestead entry for the same. Upon the filing of the relinquishment the claim of Rilea was canceled by the Register and Receiver, and on May 17, 1907, Neis filed a protest against the cancellation and relinquishment and asked for the patent to be issued on the receipt therefor issued in favor of George Rilea. The Commissioner of the General Land Office denied the request of Neis, and upon appeal to the Secre-

tary of the Interior, the claim was re-established. On April 29, 1910, the Commissioner of the General Land Office canceled the entry of Rilea and dismissed the application of Neis. Testimony on the charges filed against the Rilea entry was taken before a notary at Toledo, Oregon. On August 3, 1909, a final hearing was had thereon at the United States Land Office in Portland, Oregon. On November 24, 1909, a decision of the Register and Receiver was rendered recommending the cancellation of the Rilea homestead entry. On April 29, 1910, a decision was rendered by the General Land Office, sustaining the charges of fraud against Rilea's entry and canceling the same. In the letter of the Honorable Commissioner it was stated:

"If, as you state, Neis has conveyed his claim to the government, it would seem that neither of the contestees (Rilea or Neis) stands in a position to assert title, inasmuch as the reinstatement of the entry after Rilea's relinquishment was based on Neis's rights arising from Rilea's deed to him."

This decision was affirmed by the Secretary of the Interior September 24, 1910. On September 25, 1909, the defendant, Florence M. Ebbe, then Florence M. Creitz, filed a homestead application for the land. On November 25, 1912, Mrs. Creitz made a second homestead application for the land. On June 22, 1914, Rilea was notified of the allowance of Mrs. Creitz's entry, 03692. She made final proof therefor and on September 13, 1915, a patent to the land was issued to her.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For respondents there was a brief over the names of *Mr. Oscar Hayter* and *Mr. Sidney J. Graham*, with an oral argument by *Mr. Hayter*.

BEAN, J.—It is the contention of plaintiff that George Rilea having made a homestead entry for the land in question and on November 4, 1901, made final proof therefor and received a final certificate, and Rilea having on July 22, 1902, executed a deed of conveyance of the land to plaintiff Kola Neis, which was filed for record on July 25, 1902, in Lincoln County, Oregon, and also that no protest or contest was filed against the homestead entry within the period of two years after the date of the final receipt; that the officers of the General Land Office and Department of the Interior of the United States had no jurisdiction to cancel the homestead entry of Rilea, but should have issued a patent for the land to him; and therefore title to the land passed to plaintiff by virtue of the Rilea deed.

It appears that the land is a part of the former Siletz Indian Reservation and that on March 25, 1903, all of the entries therein were suspended by the order of the Commissioner of the General Land Office upon the direction of the Secretary of the Interior that such entries be investigated, upon information of fraud in connection therewith. After such investigation was made and a hearing was had the entry of Rilea was canceled. A report of the special agent was made August 19, 1903, and received by the General Land Office August 25, 1903, which was unfavorable to all of the entries for this class of land. On November 4, 1904, Special Agent Hobbs telegraphed the General Land Office requesting no patents to be issued for any such land. Formal written report of the fraudulent character

of the Rilea claim and twenty-two others was made November 9, 1903.

It therefore seems that before the two years had elapsed after Rilea's final receipt had been issued, the Department, pursuant to information filed and on account of objection raised by the officers under a declaration of doubt and suspicion as to the validity of the claim, was actively engaged in the investigation of the facts concerning the good faith and validity of the claim of Rilea.

It should be borne in mind that on July 10, 1909, the plaintiff and his wife executed a quitclaim deed to the United States, covering the land in question, which was duly recorded and filed in the local land office. Also on April 10, 1907, George Rilea in writing relinquished his right to the land, and the relinquishment was filed in the local land office.

The United States statute provides as follows:

"That when a pre-emption, homestead, or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office": 6 Fed. Stats. Ann., § 1, p. 300.

In the case of *Lane v. Hoglund*, 244 U. S. 174 (61 L. Ed. 1066, 37 Sup. Ct. Rep. 558), it is said:

"The statute makes it very plain that if at the expiration of two years from the date of the Receiver's final receipt there is 'no pending contest or protest' against the entry its validity no longer may be called in question—in the words of the act, 'The entryman shall be entitled to a patent, * * and the same shall be issued to him.'"

Can it be said that at the end of the two-year period after the date of the Receiver's final receipt issued to Rilea there was no protest pending against

his entry? The very life or validity of the claim of Rilea had been challenged by a report filed which was adverse to the same, and it was doubted and under investigation by the General Land Office by the order of the Department of the Interior.

The seventh section of the act of Congress of March 3, 1891, Chapter 561 (26 Stat. at L. 1095, 1099, Comp. Stats. 1916, §§ 5113, 5116), has the following provision:

“That after the lapse of two years from the date of the issuance of the receiver’s receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.”

It will be noted that the act provides for no particular form of a protest to be made. In *Lane v. Hoglund*, 244 U. S. 174 (61 L. Ed. 1066, 37 Sup. Ct. Rep. 558), the Supreme Court of the United States, speaking by Mr. Justice VAN DEVANTER, referring to this act, discussed the question:

“What, then, is the ‘pending contest or protest’ which is to exclude a subsisting entry from this statute of limitation and repose? Is it some proceeding which is begun, ordered, or set in motion in the interest of another claimant or of the public to test or determine the validity of the entry? Or may it be a mere report, letter, or other communication, confidential or otherwise, which has not been and may never be acted upon, which may be neither known nor accessible to the entryman, or which may be so general, vague, or intemperate in its statements as not in itself to merit attention? * * In short, the reference is to a proceeding against the entry and not to some communications which at most

is only suggestive of the propriety of such a proceeding and may never become the basis of one.”

The opinion appears to approve the instructions of May 8, 1891, 12 Land Dec. 450, “wherein each term [contest or protest] is spoken of as meaning a ‘proceeding’ under the Rules of Practice to cancel and defeat an entry. * * ” The same view is expressed in the supplemental instructions of July 1, 1891, 13 Land Dec. 1.

In *Lane v. Hoglund*, within two years after the date of the final certificate, a deputy forest supervisor reported to the General Land Office, recommending the cancellation of the entry, “on account of nonresidence and lack of cultivation.” No action upon this report was taken until after the expiration of the two-year period. Almost three years after the date of the Receiver’s receipt the Commissioner of the General Land Office ordered a proceeding in the local land office to determine the question of residence upon the land.

1. In the present case the Secretary of the Interior had received information as to the fraudulent character of the entry of Rilea and others, and ordered the Commissioner of the General Land Office to investigate the entry. That official had by order suspended the Rilea entry, and the machinery of the government had been put in motion for an investigation of the entry upon information of fraud in connection therewith. A proceeding against the entry was pending. All of this was prior to the expiration of the two years. We think there is a marked distinction as to the facts between the case at bar and the case of *Lane v. Hoglund* relied upon by plaintiff.

In the case of *Menasha Wooden Ware Co., Assignee, v. William Gribble*, published in 37 Land Dec. 329, the Supreme Court of the District of Columbia considered the question of "protest" under the act. In that case the Commissioner of the General Land Office had ordered an investigation of the claim of Gribble among others and instructed a special agent to carry it on. No specific charges were made. The investigation was ordered for the reason that in several claims the same witnesses had been used, which caused suspicion of fraud. The court used the following language:

"The question then is whether this constituted a contest or a protest. It was not a *contest* in the sense that a special charge had been made, much less that notice thereof had been given to the claimant, so that it might be met by him. Neither was it a *protest* in the sense that a specific ground had been pointed out for the basis of the protest and the claimant informed thereof. But are either of these necessary? There was a solemn declaration by the department that the circumstances surrounding the claim were such as to beget suspicion and to call for a thorough investigation and that in the meantime the patent ought not to be granted. * *

"As defined by Webster, a protest is 'a solemn declaration of opinion, commonly a formal declaration against some act.' Is not that exactly what this is? It was the first step in a proceeding calculated to test the validity of the claimant's right to a patent. That step having been taken within the two years, the statute of confirmation did not operate upon this claim."

Section 7 of the act of March 3, 1891, does not indicate that it was enacted for the purpose of curtailing or changing the manner or form of conducting the proceedings in the General Land Office, or before the Department of the Interior, in the case

of a contest or protest against the validity of any entry; but rather for the purpose of prompting action to be taken within the time prescribed. Where the specific facts constituting the fraud are stated, which, if true, would defeat the entry, and the Commissioner of the General Land Office has ordered the entry suspended and investigated, it would seem that such protest would be sufficient within the meaning of the statute to prevent the running of the same, although such protest does not contain all of the data necessary for a hearing. The case comes within the rule suggested by the United States Supreme Court in the *Hoglund* case. It was a proceeding "ordered or set in motion in the interest of * * the public." See, also, Acting Secretary Ryan's instruction of June 3, 1904, in which it is said:

"To be either a contest or a protest there must be a charge of specific facts which, if true, would defeat the entry and upon which the entryman or party affected may take issue and demand a hearing. In cases investigated by special agents of your office, where the agent has reported sufficient facts to justify cancellation of the entry, such report is a proceeding that prevents confirmation of an entry under the act": 33 Land Dec. Dept. Int. 10.

The trial court held that the entry of Rilea and the interest of plaintiff Neis in the land had ceased to exist, on account of the relinquishment of Rilea and the deed from plaintiff, Neis, and wife to the government.

2. The entry of Rilea was suspended within the period prescribed by the statute of repose above quoted, and proceedings were then instituted and being carried on. They were concluded after some delay, caused by the records being used in the federal court in the matter of the indictment and prose-

cution of one W. N. Jones. After a thorough investigation and regular hearing the entry was canceled of record. All of these things, plus the fact that Rilea had relinquished all his interest in the land which merely shaped the Land Office records, and also plus the fact that Neis had quitclaimed and relinquished to the government of the United States all the interest in the land conveyed to him by Rilea, gave the Land Department of the United States authority to consider the land vacant and allow the homestead entry of Florence M. Creitz (now Ebbe).

It is the contention of the plaintiff, as we understand it, that Rilea attempted to make his relinquishment in the interest of one Gooch, who applied to make homestead entry for the land; that the deed of plaintiff to the government was executed in order that Dye Wade might file upon the land; and that as the Land Office officials did not accept the relinquishment or the deed for the purpose intended, and allow either the application of Gooch or Wade, there was no acceptance thereof.

3. If there was any error on the part of the Land Office officials in denying the application of Gooch or refusing the application of Dye Wade to make a homestead entry for the land, they were the persons to take exception to such ruling; and the fact that their applications were denied would not reinvest plaintiff, Neis, with any interest in the land or reconvey any interest to him or cancel or annul the deed of conveyance which he executed to the government. It should be remembered that the legal title to the land remained in the government of the United States until patent therefor was issued to Creitz; therefore, it was not necessary for the deed from Neis to the United States to convey any legal title or to be of any more force than to relinquish

his claim. It seems that everything necessary for an acceptance of the Neis deed or relinquishment was done that could be accomplished by the United States Land Office officials, and that such acts were within the scope of their authority.

4. Neis by virtue of the quitclaim deed from Rilea obtained no better right to the land than Rilea theretofore had. If Rilea, prior to the execution of the deed to Neis, could relinquish his claim to the land, which he undoubtedly could, then Neis thereafter could perform a like act. Such transactions are of common occurrence in the United States Land Office, and we think the same are authorized by the United States statute above referred to.

Plaintiff cites and relies upon the case of *Gildner v. Hall* (D. C.), 227 Fed. 704. In that case the Land Department exercised jurisdiction in a contest initiated by a private person against an entry more than six years after the date of the Receiver's final receipt. There was no relinquishment of the entry by the claimant as in the case at bar.

Our attention has not been directed to any case where such an entryman has received the benefit of a patent to land issued by the government of the United States after the entryman or his grantee had filed a relinquishment of his interest in the land in the local land office, as was done in the present case. We think no such case can be found.

It is unnecessary to pass upon the question of the efficacy of the contest instituted by the government officials against the entry of Rilea taken as standing alone.

The decree of the lower court is affirmed.

AFFIRMED.

BURNETT, JOHNS and BENNETT, JJ., concur.

Argued January 14, reversed and dismissed March 2, rehearing denied May 11, 1920.

WILLIAMS v. SEUFERT BROS. CO.*

(188 Pac. 165; 189 Pac. 636.)

Appearance—Answer on the Merits General Appearance, Though Reserving Right of Special Appearance to Object to Jurisdiction.

1. Answer on the merits, though made after special appearance, and reserving right to object to jurisdiction, is nevertheless a general appearance.

Fish—State has Power to Regulate Fisheries.

2. Within the limits prescribed by the Constitution, the state in the exercise of its police power and for the welfare of all its citizens can regulate catching of fish in the waters of the state, or those over which the States of Oregon and Washington have concurrent jurisdiction.

[As to the right to fish in navigable river, see notes in 21 Ann. Cas. 777; 131 Am. St. Rep. 758.]

Fish—Statutory Requirement That Location License must be Renewed as Early as April 1st is Reasonable.

3. The requirement of Laws of 1915, page 226, Section 2, that one holding a license to fish with a fixed appliance shall at some date, as early as April 1st of any year, make application for renewal in order to retain the location is a reasonable one.

[As to the validity and construction of statute regulating the method of taking fish, see note in Ann. Cas. 1917D, 814.]

Fish—Failure to Renew in Time License for Location for Fixed Appliance in Columbia River is an Abandonment of the Location.

4. Under Laws of 1913, page 225, Section 1, forbidding issuance of license for a location in Columbia River for fishing with a fixed appliance which would interfere with a prior location, and Laws of 1915, page 226, Section 2, making the failure to renew a license for location for fixed appliance by April 1st of any year an abandonment of the location, the failure to renew a license is an abandonment of the location to another who had license issued for the same location on April 1st, regardless of any prior use of such location.

ON PETITION FOR REHEARING.

Fish—Decision of Fish and Game Commissioner will not be Reversed by Courts Where Facts Warrant the Action Taken.

5. A decision of the fish and game commissioner deciding question of priority as to fishing rights will not, in view of the obvious

*On government control over rights of fisheries generally, see note in 39 L. R. A. 582. REPORTER.

intention of the legislature to invest the commission with discretionary power, be disturbed where the facts and circumstances warranted the determination made.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2.

In August, 1916, plaintiff, Williams, instituted this suit in Multnomah County to enjoin the defendant, Seufert Brothers Company, from the operation of fishing tackle and the occupancy of the location of a scow fish-wheel at a certain point in the Columbia River; for restraining and advisory orders directed to the master fish warden respecting duplicate licenses; and orders to the state board of fish and game commissioners to compel recognition of Williams' priority right. Defendants appeal from a decree rendered in favor of plaintiff.

It is alleged in the complaint:

"That plaintiff is now and at all the times hereinafter mentioned has been, a citizen of the United States of America * * and for more than ten years last past a citizen and an actual *bona fide* resident of the State of Oregon.

"That defendant, Seufert Brothers Company, is now and during the period complained of has been, a corporation duly organized under and by virtue of the Oregon laws, and, under its charter empowered to take fish from the waters of the Columbia River and to pack the same for commercial purposes and to operate gear and tackle in taking fish from the waters of the Columbia River.

"That defendant, R. E. Clanton, is the duly appointed and qualified and acting master fish warden of the State of Oregon, and as such, is invested with the duty of issuing licenses to fish and to operate fishing gear and tackle, and scow fish wheels in the waters of the Columbia River within the jurisdiction of the State of Oregon.

"That defendants, James Withycombe, C. F. Stone, I. N. Fleishner, F. M. Warren and Marion

Jack comprise the board of fish and game commissioners of the State of Oregon, and as such commissioners are by law invested with the power and duty of supervision over the acts and official duties of the master fish warden, and are by law charged with the duty of supervising and regulating the issuance of fishing licenses as provided by the laws of the State of Oregon."

It is further alleged in substance:

That during the fishing season for many years past plaintiff has been accustomed to fish for salmon and other food fish on the south bank of the Columbia River for food for his family and commercial purposes, and—

"Particularly has plaintiff fished on or about a certain point more particularly described as a point situated 28.53 chains north and 12 chains west of the quarter-section corner between section one and section thirty-six in townships one and two respectively, both north of range 13 east of Willamette Meridian, in Wasco County, Oregon."

That during the different years from 1910 until 1914 licenses were regularly issued to the plaintiff and to plaintiff and his partner to fish at the point mentioned; that the defendant Seufert Brothers Company in May, 1913, opposed the operation of plaintiff's scow fish-wheel at the point described, and alleges that the defendant company through its agents unloosened the lashings and cables holding the scow fish-wheel in position.

That on the 1st of April, 1914, there was issued to the plaintiff by the master fish warden certain license "0-26" authorizing plaintiff to operate his scow fish-wheel at the point described, and that the defendant company again unloosened plaintiff's scow; that in August, 1914, defendant company unlawfully occupied the point in question with a scow

fish-wheel bearing license number "0-1" and made fast the same at the point described, said point being the identical point belonging to plaintiff for fishing purposes under his license and prior rights, and operated said scow fish-wheel to the exclusion of plaintiff. In March, 1915, plaintiff applied to the master fish warden for a license for the season 1915-16, but that defendant company objected to and prevented the issuance of such license until the season was too far advanced for profitable fishing. Plaintiff applied for and was issued a license by the master fish warden dated May 5, 1916, numbered "0-31" purporting to authorize plaintiff to operate a scow fish-wheel at the point described, and alleges on information and belief that defendant, Seufert Brothers Company, had been granted a license by the master fish warden covering the identical point in question for the season of 1916-17. Defendant, Seufert Brothers Company, claims the exclusive right of fishing at the said point in question to the exclusion of the plaintiff, and without reference to plaintiff's prior rights earned during the past years. That said point does not permit of the operation of two scow fish-wheels without interference; that the claimed rights of the defendant company were acquired subsequently and are inferior to the superior rights of plaintiff; that the defendant company operated no scow fish-wheel prior to the year 1913, nor claimed any right to fishing at the point in question; that defendant company on August 14, 1916, moved a scow fish-wheel to the point, at which time plaintiff was in the act of proceeding to said point with his scow fish-wheel under his license and thereby excluded plaintiff from said point. It is further alleged by plaintiff:

“That during the month of April, 1915, without any color of right, defendant Seufert Brothers Company erected along the river bank at said point a stone and concrete wall about 42 feet in length and 3 feet in thickness and of a varying height of from one to five feet; that said wall was designed to prevent and does prevent the proper operation of plaintiff's scow fish-wheel, and was designed to be and is an obstruction to the fishing rights of plaintiff at the point hereinbefore described.”

That the plaintiff had submitted the matter to the master fish warden and the board of fish and game commissioners, but that after investigation the board had failed to protect plaintiff's prior rights of fishing, but had instructed the master fish warden to issue duplicate licenses to defendant and to plaintiff. Plaintiff also asks an accounting by the defendant company of all profits derived from its taking fish from the point in question since the 14th of August, 1916.

Upon the service of the summons the defendant, Seufert Brothers Company, appeared especially for the purpose of objecting to the jurisdiction of the court, upon the grounds that the suit had been brought in the wrong court; that the defendant company is not a resident of Multnomah County and is the only real defendant in the cause; that the suit is in relation to title and interest in real property, to wit, the point in question, and moved for a dismissal of the suit and the quashing of the summons; and filed an affidavit showing the following facts: Its principal place of business was in Wasco County. It claims to be the owner of said point, and entitled to the possession of the same by reason of being the owner of the land abutting upon the river and the meander line of the river at that point; that the point in question is above the ordi-

nary line of high water on the river and belongs to the abutting land. The plaintiff claims that the point does not belong to the defendant company, but to the State of Oregon; that the defendant company constructed the wall described in the complaint for the purpose of using the same in connection with the shore, and claims the right to do so; that the other defendants in this case are not proper parties defendant, and are not interested in the controversy in any way; and that they were joined in this proceeding for the sole purpose of giving the court an appearance of jurisdiction. Thereafter the court overruled the motion of the defendant company.

Afterward defendant, Seufert Brothers Company, not admitting the jurisdiction of the court but insisting upon its objection that the court had no jurisdiction, filed an answer by way of abatement, and asking for the dismissal of this proceeding for want of jurisdiction and on account of the venue being improperly laid, and formally alleging in substance, the facts stated in the affidavit above mentioned, and pleaded for a dismissal of the cause. For further and separate answer the defendant company, not waiving its opposition to the jurisdiction of the court, denied many of the allegations of the complaint, and for an affirmative answer alleged that it was the owner of a large tract of land lying along the Columbia River immediately back of the point in question, and calling for boundaries running to the river; that the point in dispute is a part of a small portion of high land lying between the meander line, as surveyed by the government, and the actual shore of the river; and that the defendant, as the grantee of the government for said abutting land, also became the owner of said small portion of land

lying between the meander line and the river, including the point in question.

Defendant further averred that at divers times in 1913 and 1914, the plaintiff went upon the lands of defendant and fastened thereon and on the bank and bluff of the river far above the line of ordinary high water certain ropes and cables, thereby trespassing upon the lands owned by and in the possession of the defendant and inclosed by its fences together with natural fences, and attempted to assert a permanent claim to the right and occupation of the land; that about the year 1914, this defendant procured a license to fish at the particular point in question, and constructed a concrete wall thereon for the purpose of enabling him to safely attach a scow fish-wheel; that the company ever since has been the holder of a license from the proper authorities to fish with a scow fish-wheel at that point; and that during the years from 1910 up to the present time the plaintiff has fished at different times with his scow fish-wheel at different points up and down the Columbia River and on both sides thereof, but has never obtained any right to fish at this particular point.

Thereafter the defendant company moved for a change of venue to Wasco County, Oregon, which motion was overruled by the court.

Plaintiff replied, putting in issue many of the affirmative allegations of the answer. The defendants R. E. Clanton, master fish warden, and James Withycombe, C. F. Stone, I. N. Fleischner, F. M. Warren and Marion Jack, members of the fish and game commission, filed a demurrer to plaintiff's complaint, upon the grounds: First, that the court has no jurisdiction of the subject of the suit. Sec-

ond, that the complaint does not state facts sufficient to constitute a suit against these defendants.

After the taking of testimony the Circuit Court entered an order on August 28, 1917, overruling the demurrer of defendants R. E. Clanton et al., and rendered a decree, restraining the defendant, Seufert Brothers Company, from operating any scow fish-wheel or other fishing appliance that in any manner may interfere with the operation by the plaintiff of his scow fish-wheel at the certain point described in the complaint, or within the legal distance of 900 feet from that point, and enjoining the company from asserting any claim of prior fishing rights at said point over the rights of the plaintiff until such future time as plaintiff shall have legally abandoned the same or have otherwise disposed of his priority rights of fishing, and awarding the plaintiff priority of fishing rights and privileges at the point described; restraining the board of fish and game commissioners from issuing any license to the company to fish at the point described; and requiring the board to adopt rules and regulations governing the issuance of licenses so as to make effective the decree, and to cancel the license issued to the company.

REVERSED AND SUIT DISMISSED.

For appellant, Seufert Brothers Company, there was a brief over the names of *Mr. H. S. Wilson* and *Mr. A. S. Bennett*, with an oral argument by *Mr. Wilson*.

For the other appellants, there was a brief over the names of *Mr. George M. Brown*, Attorney General, and *Mr. John O. Bailey*, Assistant Attorney General, with an oral argument by *Mr. Bailey*.

For respondent there was a brief over the names of *Mr. James G. Wilson*, *Mr. George B. Guthrie* and

Mr. E. F. Bernard, with an oral argument by *Mr. Wilson*.

BEAN, J.—1. The preliminary question as to the jurisdiction of the Circuit Court for Multnomah County should first be disposed of. It appears that the defendant R. E. Clanton, master fish warden, resides in the county of Multnomah and was there served with a summons in the cause. Two of the commissioners also resided in that county. All of the commissioners appeared generally and filed a demurrer. The defendant, Seufert Brothers Company, was served with a summons in Wasco County. After the defendant company made a special appearance and objected to the jurisdiction of the Circuit Court of Multnomah County and moved to quash the summons, and such application was denied, it answered to the merits. This answer of the defendant company, while in form still objecting to the jurisdiction of the court, invokes a determination of the rights of the respective parties, and was a general appearance. Therefore, however, we may consider the question of jurisdiction in the first instance upon the filing of the complaint and the service of the summons upon the defendants, the Circuit Court of Multnomah County acquired complete jurisdiction by the general appearance of the defendants when some of the defendants demurred, and when the defendant company answered to the merits.

This principle is tersely enunciated by Mr. Justice EAKIN in *Jones v. Jones*, 59 Or. 308 (117 Pac. 414). We considered a similar question in *Sweeney v. Jackson County*, 93 Or. 96 (178 Pac. 365, 370), where buttressed by a quotation from the opinion in the case of *Sealy v. California Lumber Co.*, 19 Or. 94,

97 (24 Pac. 197), we held that a party cannot invoke the jurisdiction of a court and obtain the benefit of the decree, if it is in his favor, and claim contrary to such adjudication when the result is adverse to him: See *Belknap v. Charlton*, 25 Or. 41 (34 Pac. 758), and *Winter v. Union Packing Co.*, 51 Or. 97 (93 Pac. 930).

We therefore conclude that the Circuit Court of Multnomah County had jurisdiction of the cause, in so far as the validity and efficacy of the licenses issued to the respective parties are concerned, upon which the main controversy hinges.

In order to make the question in dispute clear, we state the facts in regard to the issuance of licenses at and near the point in controversy, commencing in 1914, when Seufert Brothers Company made application to the master fish warden for and was granted a license, numbered "0-1," dated April 1, 1914, to operate a scow fish-wheel situated 28.53 chains north and 12 chains west of quarter-section corner between sections 1 and 36, Townships 1 and 2 North, Range 13 East, W. M., in the Columbia River.

On March 23, 1914, Sam Williams made application for a license "to operate a fish-wheel in the Columbia River about two miles above The Dalles on the Oregon side at a place where I have had a wheel for three or four years." The following notation is on the application: "Lots 1 & 2 Sec. 1, Tp. 1 N., R. 13, E. W. M." The license was issued and dated April 1, 1914.

May 1, 1914, Williams applied to have the location of the scow fish-wheel changed to read situated "on a point in the E. half of the S. W. $\frac{1}{4}$ of Sec. 36, Tp. 2 N., R. 13, E., W. M., on the shore line of lands owned by the State of Oregon in front of Lot 3 of said Section." The location was indorsed on the

license, and the following notation made thereon: "Location of wheel changed to conform with description hereon May 1, 1914."

May 1, 1915, Seufert Brothers Company made application for a license at the same point described in its application and license in 1914, and license "0-31" was issued to it, and dated May 28, 1915.

June 8, 1915, Williams applied to the master fish warden for a license to operate a scow fish-wheel at—

"That certain point situated 28.53 chains north and 12 chains west of the quarter-section corner between section 1 in township 1 and section 36 in township 2, both townships north of range 13 east of the Willamette Meridian, in the county of Wasco, State of Oregon, at the point where I have heretofore secured and fished under state license."

The application was rejected for the reason that license numbered "0-31" had been issued to Seufert Brothers Company on May 28, 1915, for the identical place applied for. Mr. Williams was informed by letter from the master fish warden as follows:

"At the meeting of the board of Fish and Game Commissioners at the Governor's office in Salem on May 26th, after going into the matter, it was decided that, inasmuch as license had been granted to the Seufert Brothers Company upon application submitted in 1914 describing a certain identical point, that they had no option other than to order the renewal of said license, as application had been submitted conforming with the laws regulating such matters.

"They also decided, and so instructed me, to renew the license of Sam Williams upon the renewal of application as submitted in 1914, provided that a renewal of the 1914 license is desired. Therefore, should you still desire a license for a scow fish-wheel, it will be necessary for you to make an application describing the location required as was set

forth in the application submitted for a scow fish-wheel in 1914.”

January 3, 1916, Seufert Brothers Company applied for a license for a scow fish-wheel at the same point as described in their applications and licenses for the years 1914 and 1915, and the license was issued and dated April 1, 1916.

On April 5, 1916, Sam Williams applied for a license for a scow fish-wheel, describing the location “at my accustomed place described more particularly on margin hereof:

(On margin) “Description of location: That certain portion of the rocks which at low water constitute the South bank of the Columbia river opposite Lot numbered three in Section 36, Township 2 North of Range 13, East of the Willamette Meridian being in particular a certain point situated 28.53 chains North and 12 chains West of the quarter section corner between section 1 in Township one and Section 36 in Township two, both Townships North of Range 13 East of said Willamette Meridian in Wasco county, state of Oregon.”

On May 5, 1916, a license was issued to him to operate a scow fish-wheel at the point described in the application, which is in effect identical with the location for the scow fish-wheel of Seufert Brothers Company described in their license of April 1, 1916.

The gist of the controversy in this suit is in regard to the conflicting licenses issued to Seufert Brothers Company and plaintiff Williams in 1916, the other licenses having expired when this suit was brought.

The importance of the fishing industry in this state has demanded and had the benefit of the judgment of the lawmakers of the state at several different times. Prior to 1914, it seems no definite point was named in the license for a scow fish-wheel. In

order to further regulate fishing in the Columbia River, Chapter 188, General Laws of Oregon 1915, p. 226, was enacted. Section 2 of this act reads thus:

“The failure to renew the license, or make application therefor, for any fish-trap, pound-net, fish-wheel, or location for other fixed appliance, in any of the waters of this State on the first day of April of any year, shall constitute abandonment of the location.”

Section 3, as amended, Laws of Oregon 1919, p. 648, directs that should the holder of a license neglect to construct the appliance called for during two consecutive years covered by his license, said location shall be deemed abandoned. Section 8, subd. (a), provides thus:

“Licenses herein required shall be issued to any qualified person or corporation by the Master Fish Warden, upon application therefor, and the payment of the license fees herein required; a separate license shall be required for each trap, pound-net, set-net, fish-wheel or other fixed appliance, and for each seine and gill-net and dip-net, and for each person trolling for salmon in the waters of the Columbia River, and for each person other than employees engaged in the canning, packing or curing of food or shell fish, and for each person other than employees purchasing or selling food or shell fish, either as principal, agent or broker.”

Section 8, subd. (c), of the act requires all applications for licenses to specify in detail the location of any fixed fishing appliance or seine. Section 1, Chapter 128, General Laws of Oregon 1913, p. 225, provides as follows:

“It shall be unlawful for the Master Fish Warden or the Board of Fish Commissioners to grant a license to any person, firm, partnership or corporation, to build or set up fish-traps or any other fixed

fishing appliance, or drive piles therefor, in any locality in or on the Columbia River and its tributaries in this State, when in their judgment the same interferes with a prior right of fishing.”

2. Within the limits prescribed by the Constitution, the state, in the exercise of its police power and for the welfare of all of its citizens, can appropriately regulate the catching of fish in the waters of the state or those over which the States of Oregon and Washington have concurrent jurisdiction: *State v. Hume*, 52 Or. 1, 6 (95 Pac. 808); *State v. Catholic*, 75 Or. 367, 374 (147 Pac. 372, Ann. Cas. 1917B, 913); *Monroe v. Withycombe*, 84 Or. 328, 335 (165 Pac. 227).

It appears from the section of the act first quoted, that in the legislative mind it was deemed best for all the citizens of the state, and in furtherance of the interests of the fishing industry, that in order for a person holding a license to fish with a fixed appliance at a certain point in the Columbia River, to protect such right, he must apply for a renewal of the license on or before the first day of April of any year. This arrangement also would tend to prevent a failure to utilize the particular location. Prior to the enactment of Chapter 188 in 1915, “prior rights of fishing” do not appear to have been clearly defined or limited.

3, 4. The requirement that one holding a license to fish with a fixed appliance shall at some date as early as the first day of April of any year make application for the renewal of the license in order to retain the location is a reasonable one. Otherwise in cases of the abandonment of such fishing locations, citizens desiring to obtain a license and take fish at such abandoned location apparently could not make their arrangements and prepare for

securing food fish at the proper season, and consequently the industry would be retarded. If there were no regulation, it would tend to confusion and the disturbance of friendly relations between citizens. We believe that the regulations provided for by the statute may well be made without fostering any monopoly or conferring any special privilege upon any citizen which upon the same terms is not granted to all citizens.

It appears that in 1914 there was a conflict of claim between plaintiff, Williams, and the defendant company in regard to a license to fish at the point in question. Prior to that time it seems that plaintiff had fished at different locations in the river and a part of the time at the point involved. In 1915, Seufert Brothers Company applied for a license at the point in controversy, before April 1st, and the license was regularly issued to it. Afterward, on June 8, 1915, Williams applied to the master fish warden for a license to operate a scow fish-wheel at the same point, and apparently copied a portion of the description of the point from the application of Seufert Brothers Company, and we think the application was properly rejected.

In 1916, Seufert Brothers Company applied for a license for a scow fish-wheel at the point described, within the time specified by the statute and the license was issued April 1st. The application of Williams for the same kind of a license at the same point was not made until after April 1, 1916. On May 5, 1916, a license was issued to him to operate a scow fish-wheel at the point described.

We are unable to see how this license to Williams could be issued without conflicting with the license of Seufert Brothers Company, and interfering with its prior right of fishing granted by its license of

April 1, 1916. The issuance of the Williams' license does not appear to be in consonance with the spirit of the act of 1913. Two solid bodies cannot occupy the same space at the same time. It appears that there is not space for two scow fish-wheels at the point in question. It seems that the board of fish and game commissioners investigated the matter of conflict between the two licenses, but did not issue any order to cancel the license of the defendant company.

The license issued to plaintiff, Williams, May 5, 1916, was of no force or validity as against the license regularly issued to the defendant company April 1, 1916.

It might happen that a license would be issued to a person by mistake or under such conditions that another person might be entitled to a license to fish at the same place. We do not see how the second license could be issued and be effective without a hearing and adjustment in case of such conflict, and the cancellation of the prior license.

In our view the statute to which we have referred is determinative of the main question in this case. It is therefore unnecessary to consider the matter of title to the land adjacent to the river at the point of controversy. That question, should it arise, can be adjudicated in Wasco County.

The decree of the lower court, as to each of the defendants, will be reversed and the suit dismissed. Neither party will recover costs in either court.

REVERSED. SUIT DISMISSED.

McBRIDE, C. J., and JOHNS and BENSON, JJ., concur.

Denied May 11, 1920.

ON PETITION FOR REHEARING.

(189 Pac. 636.)

Mr. James G. Wilson, Mr. George B. Guthrie and Mr. E. F. Bernard, for the petition.

Mr. H. S. Wilson, Mr. A. S. Bennett, Mr. J. O. Bailey, Assistant Attorney General, and Mr. George M. Brown, Attorney General, contra.

Department 2.

BEAN, J.—Counsel for plaintiff have filed a petition for rehearing in this case, and, while we do not see our way clear to change our former opinion (reported in 188 Pac. 165) in regard to applications for fishing licenses, we wish to add to our memorandum that after the controversy arose between plaintiff and Seufert Brothers Company in 1914, in regard to fishing at the point in question and the same conflict existed in 1915, the board of fish and game commissioners gave Williams notice and proceeded to The Dalles, Oregon, for the purpose of investigating the respective rights and examining the location of the fish-wheel. They appointed a time for a hearing of the parties. It would not be expected that a record would be made as completely as would be in a court proceeding; but from the letters of the master fish warden and rulings of the fish and game commission we think it is clear that after such investigation and hearing, in the judgment of the fish and game commission, the rights of Seufert Brothers Company to fish at the point designated were superior to those of plaintiff. This

is indicated by the action taken in 1915, and by the letter to Williams from the master fish warden of May 28, 1915.

The circumstances as detailed in our former opinion, and as shown by the record, were such that it was peculiarly a question for the fish and game commission to exercise its judgment and to determine. They apparently found upon viewing the premises, adjacent to the place where applications were made to fish with a scow fish-wheel, that the company was in peaceful possession of the shore or bank, claiming to be the owner thereof; and that the scow fish-wheel could not well be operated without using the shore. The commissioners believed that plaintiff Williams did not have a prior right of fishing at the point in question, but offered to grant a license to him identical with the one issued to him in 1914. They evidently decided that Williams by moving his scow fish-wheel and fishing at different places could not obtain a priority at all of such places.

The testimony in the case does not warrant a court in setting aside the decision of the fish and game commission. As stated by Mr. Justice JOHNS in *Holmes v. Olcott, ante*, p. 33 (189 Pac. 202), in which an opinion was rendered April 13, 1920:

“It was the evident purpose and intent of the legislature to invest the commission with a discretionary power for the protection and propagation of game within the state. * * ”

To reverse the rulings of the fish and game commission where the facts and circumstances of the case warrant the action taken by that tribunal, would be to practically deprive it of any authority in the administration of the laws relating to the fishing industry.

For these reasons, in addition to those mentioned in our former memorandum, the petition for rehearing is denied.

AFFIRMED. SUIT DISMISSED. REHEARING DENIED.

McBRIDE, C. J., and JOHNS and BENSON, JJ., concur.

Argued March 17, affirmed April 20, rehearing denied May 11, 1920.

SHEVCHUK v. KOTCHIK.*

(189 Pac. 399.)

Stipulations—As to Ownership of Lot Controls Allegations in Pleadings.

1. Where a judgment was based on both pleadings and stipulation that the plaintiffs owned a certain lot, plaintiffs' ownership must be assumed, regardless of allegations or denials in the pleadings.

Easements—Sewer Easement by Instrument not Recorded is not Binding on Purchaser Without Notice.

2. In an action for damages for obstruction of a sewer, alleging defendants maintained a connection with plaintiffs' sewer on plaintiffs' land without authority, a writing by plaintiffs' grantor, giving defendants such authority, but not executed with the formality of a deed, was not entitled to record, and, not being recorded, the easement, right or equity ended with plaintiff's purchase, unless purchasers had notice of the easement, and the burden was on defendants to prove such notice.

Appeal and Error—Discrepancy as to Plaintiff and Plaintiffs Ascribed to Clerical Errors.

3. Where in the body of a complaint reference is sometimes made to "plaintiff," sometimes to "plaintiffs," and the briefs make no reference to these discrepancies, the difference will be ascribed to clerical errors.

From Multnomah: **ROBERT G. MORROW, Judge.**

*On the question of physical condition which will charge purchaser of servient estate with notice of easement, see note in 3 L. R. A. (N. S.) 418. REPORTER.

Department 1.

This is an action for damages brought by Nazar Shevchuk and Millie Shevchuk, his wife, against Fred Kotchik and Anna Kotchik, his wife, on account of an alleged unlawful interference with and obstruction of a private sewer. There were no pleadings except a complaint and an answer. After the answer was filed, the plaintiffs moved for a judgment on the pleadings on the ground that the answer did not constitute a defense, even though all the allegations in the answer be accepted as true. The trial court concluded that the plaintiffs "were entitled to nominal damages for trespass," and rendered a judgment against defendants for nominal damages, together with costs and disbursements. The defendants appealed.

In the amended complaint, which was filed on November 12, 1917, it is averred that the "plaintiff" is the owner in fee simple of lot 2 in block 19, in Sellwood, in the City of Portland, and that the defendants own and reside on an adjoining lot. It is then alleged in the complaint that without the knowledge or consent of the "plaintiff," the defendants connected a sewer-pipe, leading from their premises, with a sewer-pipe owned and maintained by the "plaintiffs" on lot 2, and that the point of connection is within the boundaries of "plaintiff's" lot. In the complaint it is averred that refuse coming from the premises of the defendants often obstructed plaintiffs' sewer; that defendants are trespassers and that "by reason of said trespass and the obstruction of plaintiff's sewer-pipe" the plaintiff was compelled, during the years 1916 and 1917, to work 312 hours in removing the obstructions and cleaning out the sewer-pipe. After alleging that the

plaintiff demanded of the defendants, prior to the commencement of this action, that they remove "the afore-mentioned nuisance, in that they remove their sewer-pipe from the property of the plaintiff, but defendants refused, failed and neglected to do so," the complaint concludes with a demand for a judgment for \$109.20, the alleged reasonable value of the work done by the plaintiff.

The answer denies all the allegations of the complaint, except the averment that plaintiff and his family reside on lot 2, and the allegation that the defendants own and reside on an adjoining lot. The answer also contains an affirmative defense and a counterclaim. In substance, the defendants say that on August 14, 1914, Kiril Barmatow, the husband of Anisa Barmatow, was "seized in fee simple of" lot 2, which lot is also known as 1705 East Eighth Street, and that on that date Kiril Barmatow in consideration of \$10 granted unto Fred Kotchik a "permanent easement" to construct a sewer from defendants' dwelling, "across and upon" lot 2, and to connect it with the private sewer of Kiril Barmatow, and "said easement was so granted by" a writing which reads as follows:

"Portland, Oregon, August 15, 1914.

I, Kiril Barmatow, do hereby grant permission to Fred Kotchik to make connection to my private sewer at 1705 East Eighth Street for the sum of Ten Dollars (\$10.00). This connection to be permanent, and he is to retain the use of it as long as he sees fit.

"(Signed) KIRIL BARMATOW.

"Witness: JOHN KOTCHIK."

The defendants aver that immediately after the execution of the writing they constructed a sewer, and connected it with the private sewer of Kiril

Barmatow. The defendants also allege that the plaintiffs are in the actual possession of lot 2, "claiming title thereto, by deed dated November 11, 1916, from said Anisa Barmatow to them as tenants by the entirety." The defendants aver that plaintiffs were negligent in the care of their sewer-pipe, and that they permitted it to become obstructed, causing the sewer of the defendants to overflow, to the damage of the defendants in the sum of \$200, for which amount the defendants demand judgment against the plaintiffs.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. C. A. Appelgren*.

For respondents there was a brief and an oral argument by *Mr. S. J. Silverman*.

HARRIS, J.—1. The printed abstract, filed by the defendants, contains a transcript of an affidavit made by the attorney for the defendants. This affidavit recites, among other things, that the judgment "given by the court" was based upon the pleadings and "the stipulation that Kiril Barmatow was the owner of the property, now belonging to plaintiffs on August 14th, 1914, * * and that plaintiffs were now the owners of said premises." In other words, the defendants themselves say that the trial judge based his ruling, not upon the pleadings alone, but upon the pleadings and a stipulation that the plaintiffs own lot 2; and therefore, we must assume, regardless of any allegations or denials in either of the pleadings, that the plaintiffs became the owners of lot 2 subsequent to the execution of the writing given by Kiril Barmatow to the defendants.

2. It is not necessary to decide whether the defendants acquired a mere license, or a permanent easement, from Kiril Barmatow; nor, if it be assumed that the defendants acquired an easement, need we attempt to ascertain whether the easement was appurtenant or in gross. For the purposes of this discussion, we may assume that, as between Kiril Barmatow and the defendants, the former granted to the latter an irrevocable right to connect with and maintain the connection with the sewer on lot 2.

The plaintiffs, who were subsequent purchasers of lot 2, would not be bound by the assumed easement in the absence of actual or constructive notice of its existence. It makes no difference whether we say that the writing signed by Kiril Barmatow of itself created an easement, or whether we hold that it granted a mere license which, by reason of work done and expenditures made by the defendants, was converted into an irrevocable right or easement, for in either event it must be held that the defendants cannot prevail, even though it be assumed that the affirmative matter in the answer is true. The writing signed by Kiril Barmatow was not executed with all the formalities of a deed, and for that reason it was not entitled to be recorded; nor is it claimed that the writing was recorded. If the plaintiffs purchased with notice of an easement, then, of course, they took the land burdened with that easement; but if the plaintiffs purchased without notice, they did not take the land burdened with the easement: 19 C. J. 939, 940. The defendants concede that the plaintiffs as subsequent purchasers are the owners of the legal title to lot 2, and yet the defendants are attempting to fasten and attach to the land an easement or a right or an equity without

averring that the plaintiffs purchased with notice of the easement or right or equity. In the absence of notice to the plaintiffs, the easement or right or equity terminated contemporaneously with the purchase. This is not a suit in equity in which a *bona fide* purchase without notice is interposed as a defense. Whether or not the defendants have a present right depends upon whether or not the plaintiffs purchased with notice. The defendants have no right if there was no notice to the plaintiffs. The answer admits the maintenance of the sewer connection, but it fails to show that the connection is rightfully maintained. The answer admits the doing of an act which the defendants have no right to do, unless they show that the plaintiffs purchased with notice; and, not having alleged notice on the part of the plaintiffs, the defendants are found relying upon an answer which alleges a wrongful act: *Advance Thresher Co. v. Esteb*, 41 Or. 469, 477 (69 Pac. 447); 39 Cyc. 1778, 1783, and cases in note 3, including *Peterson v. McCauley* (Tex. Civ. App.), 25 S. W. 826.

3. In the complaint Nazar Shevchuk and Millie Shevchuk are named as plaintiffs. In the body of the complaint reference is sometimes made to "plaintiff" and sometimes to "plaintiffs"; and the judgment speaks of "the plaintiff." The briefs make no reference to these discrepancies, and we assume that these differences may be ascribed to mere clerical errors. The judgment appealed from is affirmed.

AFFIRMED. REHEARING DENIED.

BEAN, BENSON and BURNETT, JJ., concur.

Argued April 7, reversed and judgment entered on verdict May 11, 1920.

BLASER v. FLECK.

(189 Pac. 637.)

Parties—Requirement of Real Party in Interest Satisfied, if Judgment will Protect Defendant Against Future Action.

1. Section 27, L. O. L., requiring every action be prosecuted in name of real party in interest, was enacted for benefit of defendant to protect him from being again harassed for same cause, but if not cut off from any just offset or counterclaim against the demand, and if a judgment in behalf of plaintiff will fully protect him when discharged, his concern is at an end.

New Trial—Technical Manner of Pleading Ownership not Open on Motion for New Trial.

2. In action for conversion, question as to technical manner of pleading plaintiffs' ownership was not open to defendants on their motion for new trial.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2.

This is an action for the conversion of certain personal property. The cause was tried to the court and a jury and a verdict and judgment rendered in favor of the plaintiffs. Upon the motion of defendants to set aside the same because the evidence was insufficient to support the verdict, the court set aside the verdict and granted a new trial. From this judgment plaintiffs appeal.

The plaintiffs, by their complaint, allege, in effect, that they are husband and wife; that on a certain date they were the owners of twenty-five tons of hay and six cows of the total value of \$1,350; that defendants wrongfully converted the same to their own use. The answer consisted of a general denial. The jury returned a verdict for the plaintiffs for the sum of \$1,130.

The motion for a new trial was granted for the reason there was no evidence to show that—

The plaintiffs “jointly owned any of the property in controversy, but that the evidence did show that a portion of the property in controversy, to wit, two cows and the hay described in the complaint, were owned by plaintiff Martin Blaser, and that the other four cows were the property of plaintiff Catharine Blaser, so that there was no evidence to support a verdict in favor of both of the plaintiffs, and no evidence sufficient to authorize the jury to find a verdict for either of the plaintiffs alone for the amount of the verdict.”

REVERSED AND JUDGMENT ENTERED ON VERDICT.

For appellants there was a brief with oral arguments by *Mr. S. S. Johnson* and *Mr. T. B. Handley*.

For respondents there was a brief over the names of *Mr. H. T. Botts* and *Mr. George P. Winslow*, with an oral argument by *Mr. Botts*.

BEAN, J.—Plaintiffs contend:

“First, there was evidence before the jury of joint or community ownership by the plaintiffs; second, that the evidence before the jury showed that either plaintiff had sufficient interest to maintain an action for the conversion of the property; and, third, in any event, a conversion of the property by the defendants was established at a time when it was in the possession and under the control of the plaintiffs, and that the defendants can never be sued again for the same conversion, and have not been cut off from any just offset or counterclaim against either or both of the plaintiffs, by reason of the latter’s joining in this action.”

The testimony tended to show that plaintiffs, who were husband and wife, were operating a dairy; that most of the cows were leased; that they owned

six cows, which were kept with the leased ones; that on account of the services of Mrs. Blaser, Mr. Blaser had some time before the action in question promised to give her four calves, which had grown to cows. Martin Blaser, as witness, in describing the cows taken by the defendant, said: "And there were six cows we had in the barn ready to take away." Mr. Blaser had leased the farm from the defendants and when vacating the premises, as he states:

"I told Fleck, 'I don't want to leave them cows here;' and so he said I had to leave everything; and I told the sheriff and the sheriff said, 'You just turn them cows over to me and if something happens to those cows you just come to me'; and then I turned them cows over to him and turned them out in the pasture while he was there. * * The cows I claimed at that time and which Fleck took charge of, those yearlings I brought on the place; * * my wife worked for me down on Haverlach place and I told her she could keep those heifers if she do the milking."

This witness asserts his title to both the cows and the hay. Mrs. Blaser testified, in effect, that she had been Martin Blaser's wife for eight years and assisted him in conducting his dairy ranches and harvesting the hay during that period, and was at the time of the conversion in the joint possession of the property with her husband. Like her husband she asserts ownership to the property. She stated: "About the six cows, we told him [Fleck] that they been ours. We bought them from Haberlach." She said that the hay belonged to her and her husband.

The position of the defendants is, in effect, that there was a misjoinder of plaintiffs, and that the action is not prosecuted by the real parties in inter-

est. The rule is stated in Pomeroy's Code Remedies, Section 711, thus:

“The nonjoinder of necessary parties cannot be proved under the general denial; it is new matter, and must be pleaded; nor can the misjoinder of plaintiffs be relied upon under a denial; the question must be raised by a demurrer or by a special answer. The defense that the plaintiff is not the real party in interest is new matter.”

1. A question similar to the one in the present case was disposed of in *Sturgis v. Baker*, 43 Or. 236, at page 241 (72 Pac. 744). It was there held that the statute requiring that every action shall be prosecuted in the name of the real party in interest (Section 27, L. O. L.), was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end: See, also, *Simon v. Trummer*, 57 Or. 153, 159 (110 Pac. 786), *Triphonoff v. Sweeney*, 65 Or. 299, 307 (130 Pac. 979), and *Devlin v. Moore*, 64 Or. 433, 441 (130 Pac. 35).

As we read the complaint in the case at bar, there is no allegation in so many words that the plaintiffs were joint owners of the property involved; yet the pleading was not challenged by a demurrer or otherwise. The defendants did not plead in their answer any facts showing that there was a misjoinder of plaintiffs, or that the action was not prosecuted in the name of the real parties in interest. They were not deprived of any right to set up a counterclaim or setoff: *Loewenberg v. Rosenthal*, 18 Or. 178, 184 (22 Pac. 601); *Miser v. O'Shea*, 37 Or. 231, 235 (62 Pac. 491, 82 Am. St. Rep. 751).

The plaintiffs, who were witnesses, did not speak plain English, and it may not be clear just what interest each had in the property in question. That they owned it among themselves and that the defendants converted it appears to have been proven beyond controversy.

2. There can be no question but that both of the plaintiffs would be bound by a judgment in the case, and that the same would be a complete bar to any future action for the property in question. The defendants would be completely protected from being harassed in the future for the same cause of action. Under the present status of the case, it is not a matter of consequence to the defendants as to how the plaintiffs adjust their property rights between themselves. The question as to the technical manner of pleading plaintiffs' ownership of the property was not open to the defendants upon a motion for a new trial. The lower court erred in granting the motion. Therefore the judgment of the lower court is reversed, and one will be entered here upon the verdict in favor of plaintiffs.

REVERSED. JUDGMENT ENTERED ON VERDICT.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued April 13, affirmed May 11, 1920.

CENTRAL PACIFIC RY. CO. v. GAGE, SHERIFF.
(189 Pac. 643.)

Mandamus—Taxation—Writ may Issue to Compel Acceptance of Tax—Sheriff cannot Prevent Contest of Road Tax by Refusing to Accept Other Taxes Without Road Tax.

1. Sheriff and tax collector of county is not entitled to refuse timely tender by owner of realty of state and county taxes, a school district tax, a port tax, and a fire-patrol tax, because taxpayer did not also tender amount charged as tax by road district for the year, and taxpayer, entitled to contest illegal tax, can have *mandamus* to compel sheriff to receive payment.

[As to *mandamus* against ministerial officers and boards, see note in 98 Am. St. Rep. 869.]

From Coos: JOHN S. COKE, Judge.

Department 1.

The plaintiff says it is the owner of certain real property in Coos County upon which for the year 1917 there was assessed for state and county tax \$1,259.18; for School District No. 9, \$764.92; for Port of Coos Bay, \$241.25; for fire patrol, \$9.20, totaling \$2,274.55. It claims to have made timely tender of the full amount of each of these taxes to the defendant, who is the sheriff and tax collector, but that he refused to receive them because the plaintiff did not tender therewith the additional sum of \$529.56 charged as a tax against the property by Road District No. 8 of Coos County for the year mentioned. The plaintiff alleges these facts, brings into court the amount of money tendered, and seeks by *mandamus* to compel the sheriff to accept it in payment of the several taxes which the plaintiff admits to be due.

The answer of the defendant is to the effect that the plaintiff tendered all of the taxes charged against it except the road district tax, and urges

that as a reason for dismissing the writ. A demurrer to this answer was sustained. The tenders as stated by the complaint were admitted by special stipulation. The court made the *mandamus* peremptory and the defendant appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John F. Hall*.

For respondent there was a brief and an oral argument by *Mr. Ben C. Dey*.

BURNETT, J.—1. These are not taxes levied as an aggregate by the same taxing power. They are composed of different items authorized and levied by separate taxing jurisdictions, either one of which the taxpayer is entitled to contest. The defendant was authorized to collect, not one, but several different taxes each independent of the others and emanating from a separate source. It is plain that an illegal or void tax levied by one jurisdiction cannot be supported by a regular tax laid by other authorities. The valid tax cannot be made a scapegoat for the invalid one. The plaintiff cannot be cut off from its right to contest the illegal tax by any such procedure. Under such circumstances it is the privilege of the taxpayer to pay the separate taxes which it admits to be due and have the payments applied as tendered: *Duvall v. Perkins*, 77 Md. 582 (26 Atl. 1085); *State v. Hoffman* (Tex.), 201 S. W. 653; *Iowa R. R. Land Co. v. Carroll County*, 39 Iowa, 151; *Coit v. Claw*, 28 Ark. 516; *County of Olmsted v. Barber*, 31 Minn. 256 (17 N. W. 473, 944). This distinguishes the case of *Julian, Sheriff, v. Ainsworth*, 27 Kan. 446, cited by the de-

fendant. That was a case where the contested tax was part of one levied by the county, while here the objection is to a distinct and several tax levied by a different taxing power. There, it was held that the proper procedure for the plaintiff was to allege the invalidity of that portion of the tax he contested, tender the amount he admitted justly to be due, and sue to enjoin the collection of the invalid portion of the whole tax. Here, it is the privilege of the plaintiff to pay the several independent taxes it admits, and compel their application by *mandamus*, which is an affirmative remedy. The plaintiff's right to injunction will arise when the sheriff attempts to collect the supposed illegal, and separate tax. By accepting the amounts covering the four admitted taxes, no prejudice would have accrued against the defendant's remedy to enforce collection of the disputed levy. His power as to that remained unimpaired. The judgment of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued March 31, affirmed May 11, 1920.

PIONEER SHOW & COMMERCIAL PRINTING
CO. v. ZETOSH.

(189 Pac. 644.)

Frauds, Statute of—Memorandum of Guaranty not Expressing Consideration Void.

1. A memorandum guaranteeing a printing company against loss for printing done for a named corporation, which does not express the consideration, either by express terms or so as to indicate that the particular consideration, and no other, was that upon which

the contract was given, is insufficient, and the contract is void under Section 808, subdivision 2, L. O. L.

[As to the necessity for statement of consideration in contract within statute of frauds other than contract to answer for debt of another, see note in *Ann. Cas.* 1918A, 134.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

The Pioneer Show and Commercial Printing Company, a corporation, is attempting to recover from the defendants the sum of \$775. The action is based upon the following writing:

"Walter Reed, President; Sidney Zetosh, Secretary-Treasurer; Lee Riley, Advance Representative; Milton W. Seaman, Manager.

"September 12, 1917.

"To Pioneer Printing Company,

"Seattle, Washington.

"WE, THE UNDERSIGNED, do hereby guarantee The Pioneer Printing Company of Seattle against loss for printing done for the Western Producing Company (Inc.) to the sum of Seven Hundred Seventy-five dollars (\$775.00) for THE OLD HOMESTEAD.

"Signed:

"SIDNEY ZETOSH.

"MILTON W. SEAMAN,

"WALTER REED.

"C. V. EVERETT."

There was an involuntary judgment of nonsuit; and the plaintiff appealed. AFFIRMED.

For appellant there was a brief over the names of *Mr. Alfred P. Dobson* and *Mr. Cassius E. Gates* (Seattle, Washington), with an oral argument by *Mr. Dobson*.

For respondent there was a brief and an oral argument by *Mr. John J. Fitzgerald*.

HARRIS, J.—1. The Code, Section 808, subd. 2, L. O. L., provides that an agreement to answer for the debt, default or miscarriage of another is void, unless the same or some note or memorandum thereof, expressing the consideration, be in writing. The trial court ruled that the instrument signed by the defendants did not express the consideration as required by the statute, and the only question for decision is whether that ruling was correct.

In all jurisdictions where, either by force of statute or by judicial decision, the consideration must be expressed, the rule, following the formula in *Hawes v. Armstrong*, 1 Bing. N. C. 761 (27 E. C. L. 575), is that the consideration is expressed, if it appears in express terms or if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it that such, and no other, was the consideration upon which the undertaking was given: *The Oregon Home Builders v. Crowley*, 87 Or. 517, 532 (170 Pac. 718, 171 Pac. 214). A mere conjecture, however plausible, that the consideration stated in the complaint was that intended by the memorandum, is not sufficient to satisfy the statute; but, as ruled in *Hawes v. Armstrong*:

“There must be a well-grounded inference, to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise.”

The complaint states that the future creation and furnishing of printed display advertising, cards, heralds and sheets to the Western Producing Company, a corporation, for use in advertising a theatrical performance, was the consideration; but that does not appear, either expressly or by necessary

implication, on the face of the writing. At least two, and possibly more, considerations might be suggested, and it would be mere conjecture which was the one intended by the parties. *Price v. Richardson*, 15 Mees. & W. 539, is a precedent quite in point. The judgment is affirmed. **AFFIRMED.**

McBRIDE, C. J., and BENSON and BEAN, JJ.,
concur.

Argued March 30, affirmed May 11, 1920.

JONES v. JONES.*

(189 Pac. 896.)

Corporations—Evidence Held to Show Indebtedness was Paid by Transfer of Stock.

1. In suit by children of one brother and his wife against children of another brother to have declared a mortgage a deed of a sawmill from plaintiffs' father and mother to defendants' father, and to secure adjudication stock was transferred as security for indebtedness owing by plaintiffs' father, evidence *held* to show defendants' father held stock as security until a certain date, but that at such time an indebtedness owing to him from plaintiffs' father was paid with five shares, and that defendants' father became absolute owner of such number.

Mortgages—Evidence Held not to Show Deed a Mortgage.

2. In suit by children of one brother and his wife against children of another brother to have declared a mortgage a deed of a sawmill from plaintiffs' father and mother to defendants' father, evidence *held* insufficient to meet burden imposed by law on a party claiming that an instrument in form a deed is in reality a mortgage.

Mortgages—Heavy Burden on Party Claiming Deed a Mortgage.

3. The law imposes a heavy burden of proof on a party who claims that an instrument formally a deed is in reality a mortgage.

*On parol evidence that a written instrument which on its face imports a complete transfer of a legal, or equitable estate or interest in property was intended to operate as a mortgage, see comprehensive note in *L. R. A.* 1916B, 18. **REPORTER.**

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

This suit was brought for the purpose of declaring a deed a mortgage, and for securing an adjudication that certain shares of stock were transferred as security for certain indebtedness.

Elihu K. Jones and Emma J. Jones were husband and wife; and Arthur W. Jones, Lillian J. Viggers, Grace V. Jones, Harvey W. Jones, H. Paul Jones and Marietta H. Zimmerman, the plaintiffs, are the children and heirs of Elihu K. Jones and Emma J. Jones. Emma J. Jones died on April 22, 1916, and Elihu K. Jones died on January 7, 1917.

John Halsey Jones was a brother of Elihu K. Jones. The defendants Herman H. Jones, Birdie L. Schalk, Lavina D. Grindstaff and Elizabeth Towne are the children and heirs of John Halsey Jones, who died on March 21, 1906.

The children of Elihu K. Jones and Emma J. Jones commenced this suit in April, 1917, against the children of John Halsey Jones. For the sake of brevity John Halsey Jones will be called John; Elihu K. Jones will be referred to as Elihu; and the children of the respective brothers will be designated by their given names. On September 17, 1895, Elihu and Emma J. Jones gave to John a quitclaim deed for 3½ acres of land upon which a sawmill was located. At the time of the execution of this deed, the grantors were indebted to different persons for a considerable aggregate sum, including a debt of \$15,000, which was secured by a mortgage on the sawmill property. The plaintiffs aver that their father also owed \$2,600 to John, and that the latter

held, as security for this alleged indebtedness, certain shares of stock owned by Elihu in a corporation known as the E. K. Jones & Company. The plaintiffs aver that in 1895 the owner of the mortgage was demanding payment and threatening foreclosure proceedings. The plaintiffs say that the financial conditions existing throughout the country were such that enforced payment of the mortgage by foreclosure proceedings would have resulted in great loss and perhaps ruin to Elihu and Emma J. Jones. The plaintiffs aver that John, who was in comfortable financial circumstances, seeing the apparent financial distress of his brother and sister-in-law, expressed a willingness to assist them and if possible prevent their financial ruin and save their equity in the mortgaged property. The plaintiffs contend that on September 17, 1895, the deed to the sawmill property was delivered to John with the understanding that he would pay or otherwise take care of the mortgage indebtedness, and that he would take charge of and manage the real property and collect the rents and profits arising from it, together with the earnings and profits from the shares of stock, which the plaintiffs allege John held as security for the alleged \$2,600 indebtedness, and that after he had satisfied the alleged debt of \$2,600 and reimbursed himself for moneys advanced in the liquidation of the mortgage indebtedness, as well as all sums expended in the payment of taxes or other legal charges upon the property, he would thereupon reconvey the real property to Emma J. Jones and reassign the shares of stock to Elihu. The defendants claim that the deed was given as an absolute conveyance, and that their father was the absolute owner of the shares of stock in controversy. There

was a decree for the defendants, and the plaintiffs appealed. AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. A. H. Tanner* and *Mr. Maurice W. Seitz*.

For respondents there was a brief over the names of *Messrs. Giltner & Sewall* and *Mr. Guy C. H. Corliss*, with oral arguments by *Mr. Russell E. Sewall* and *Mr. Corliss*.

HARRIS, J.—The realty involved in this litigation is sometimes referred to as the sawmill property. Confusion may be avoided, if at the outset we call attention to the fact that since a time prior to September 17, 1895, the sawmill has been owned by one person or corporation and operated by other persons or another corporation. In the beginning Elihu was the owner of the sawmill property. On August 12, 1892, Elihu still owned and held the record title of the sawmill property; and on that date he and his wife gave their note for \$15,000 to C. E. Withington, agent, payable three years after date, and they secured the note by mortgaging the sawmill property. On February 12, 1894, J. E. Hazeltine & Company secured a judgment against Elihu. On the following sixth day of July, an execution was issued on the judgment, and the sheriff levied on the sawmill property. At the sale on execution, which occurred on August 13, 1894, the property was struck off to Emma J. Jones for \$1,009.04; subsequently on March 1, 1895, she received a deed from the sheriff. The plaintiffs insist that Emma J. Jones paid her own money to the

sheriff; but the defendants contend that the funds were in reality furnished by Elihu, and that she took and held the title merely for the purpose of securing herself against loss by reason of her having allowed Elihu to mortgage a tract of land owned by her in Clackamas County to secure the sum of \$5,000 which he had borrowed from Carey Johnson. It is not necessary to decide, and we do not attempt to determine, whether the moneys paid to the sheriff were realized from property which in truth was owned by Emma J. Jones, or whether Elihu furnished the funds. However, regardless of the source from whence came the money paid to the sheriff, the evidence impresses us with the idea that Emma J. Jones held the title as security rather than as absolute owner. Moreover, it must be remembered at all times that the note to Withington was the debt of both Emma J. Jones and Elihu.

The next conveyance is a quitclaim deed made by Emma J. Jones and Elihu to John on September 17, 1895. This controversy is centered around that conveyance. The instrument is witnessed by Ira Jones and Lillian, and it was acknowledged by the grantors before Ira Jones as a notary public. It is appropriate here to say that Ira Jones was an attorney, and that, while there may be room for debate as to whether on September 17, 1895, he represented the grantors or the grantee or all the parties to the deed, the evidence indicates that he was acting for the grantors rather than for the grantee, for there is no evidence that he ever represented the grantee on any other occasion, and it does appear that he had previously acted as attorney for the grantors. The importance of the presence of Ira Jones will become manifest when we come to consider all the cir-

cumstances attending the execution and delivery of this deed. About six years after receiving the deed to the sawmill property, John organized the John Halsey Jones Company, a corporation, for the purpose of holding all properties owned by him, and on May 19, 1901, he conveyed the sawmill property to the John Halsey Jones Company. Upon the death of John, on March 21, 1906, the stock in the John Halsey Jones Company was inherited by his children, and they in effect became the record owners of the sawmill property. Having given an account of the ownership of the record title to the sawmill property, we shall briefly relate the history of the operation of the mill.

On January 2, 1890, Elihu and J. D. Young entered into a partnership for the purpose of manufacturing lumber; and on September 15, 1890, John became a member of the firm. Subsequently on March 17, 1891, John sold his interest to his son Herman, and from that date Elihu, J. D. Young and Herman were partners, doing business under the firm name of E. K. Jones & Company. On January 2, 1892, Elihu leased the sawmill property to the partnership for the term of thirteen years at a rental of \$300 per month.

On January 27, 1892, E. K. Jones & Company, a corporation, was organized with a capital stock of \$50,000, divided into 50 shares having a par value of \$1,000 each. The stock was issued as follows: To Elihu, 17 shares; to John, 1 share; to Herman, 16 shares; and to J. D. Young, 16 shares. The lease held by E. K. Jones & Company, the partnership, was assigned to E. K. Jones & Company, the corporation. On May 19, 1893, Elihu made a new lease to E. K. Jones & Company, the corporation. This

new lease abrogated the lease made to the partnership, and was for a term of 12½ years and for a rental of \$200 per month. The lease recites that the corporation is desirous of entering into a contract, not only for the use of the property, but also for the right to purchase it, and it is particularly provided in the instrument that the corporation may purchase the sawmill property at any time within the term of the lease for the price of \$50,000. Elihu directed this corporation to pay, and it agreed to pay, \$100 of the rental to Withington on account of the mortgage held by the latter. Elihu also directed, and the corporation agreed to pay, the remaining \$100 of the monthly rental to Emma J. Jones on account of her having signed a note with him for \$5,000, which she had secured by giving a mortgage on her separate property.

On January 14, 1893, Herman transferred three shares of the E. K. Jones & Company stock to Lincoln A. Young; but by December, 1899, Herman and his father had acquired the ownership or gained control of all the stock of this corporation. On December 23, 1899, a corporation known as the Jones Lumber Company was organized with a capital stock of \$100, divided into 100 shares with a par value of \$1.00 each. Immediately, upon the organization of the Jones Lumber Company, all the assets of the E. K. Jones & Company, a corporation, were transferred to the Jones Lumber Company, and since that time the latter has operated the sawmill. It is not clear from the record whether 34 or 56 shares of the Jones Lumber Company were issued to John, although it does appear that Herman and John owned, or at least controlled, all the stock of the Jones Lumber Company from the date of its organi-

zation until the death of John; and since that time the children of John have been the owners of the stock.

1. Before discussing the circumstances attending the execution of the deed dated September 17, 1895, we shall relate some of the details connected with the transfer from Elihu to John of the 5 and 12 shares of stock in the E. K. Jones & Company, a corporation. It will be recalled that upon the organization of the E. K. Jones & Company, a corporation, 17 shares were issued to Elihu, and John received only 1 share. On October 7, 1892, Elihu assigned 5 shares to John, and on that date certificate No. 5 for five shares was issued to John, and to Elihu was issued certificate No. 6 for 12 shares, which was the remainder of the 17 shares originally issued to Elihu. About four months afterward, under date of January 25, 1893, Elihu assigned certificate No. 6 for 12 shares to John, and certificate No. 9 for 12 shares was issued to John. On January 30, 1893, John signed a writing in which he acknowledged that on October 7, 1892, he received 5 shares of stock in E. K. Jones & Company, and that on January 25, 1893, he received 12 shares of stock in the same company, and that he held this stock as security for \$2,600, with interest at 8 per cent per annum from October 7, 1892, and that he agreed to retransfer the stock to Elihu, provided the sum of \$2,600 with interest was paid within one year. In view of the many debts which Elihu owed and was unable to pay, it is reasonably certain that no part of the sum of \$2,600 was paid by him. That an adjustment of some kind was made is certain from the fact that on January 22, 1895, John executed an assignment on the back of certificate No. 9 by which he transferred to Elihu the 12 shares represented by that certificate,

and on the next day, January 23, 1895, Elihu assigned the stock to Emma J. Jones. It is the contention of the defendants that on January 22, 1895, Elihu and John had a settlement whereby the indebtedness of \$2,600 was satisfied by John keeping 5 shares as full payment, and returning the 12 shares to Elihu. Herman gives direct testimony in support of this position taken by the defendants, and the circumstances connected with the transaction give strength to that position. Our conclusion is that John held the two certificates for 17 shares as security until January 22, 1895, but that at that time the indebtedness of \$2,600 owing from Elihu was paid with five shares, and that John became the absolute owner of that number of shares.

We now come to the deed. Elihu, Emma J. Jones, and John, the parties to the deed, all are dead. Ira Jones, who not only was probably the attorney for the grantors, but was also one of the witnesses and the notary public before whom the deed was acknowledged, is dead. J. D. Young also is dead; and he was for a long time associated with Elihu and John as secretary of E. K. Jones & Company, a corporation, and apparently he was active in the management of the mill, and in all likelihood he knew much, if not all, about the business transactions between the two brothers relating to the sawmill property. Lillian and Grace were present at the execution of the deed, and much reliance is placed on their testimony by the plaintiffs. Lillian was almost 18 years of age in September, 1895, and she signed as one of the witnesses to the deed. Lillian says that she and her mother and her sister Grace were at their home and that her father "came into the house, bringing with him his brother and Ira Jones"; that her father stated that "they had come

to have her sign the deed over" to John; and that her mother "said she would not sign it." The witness explained that her father had previously talked to her mother about signing the deed and that she had told him she would not sign it. When Emma J. Jones would not sign the deed, John, according to the testimony of this witness, said to her mother:

" 'I will return this after the obligations are paid and I get my money out of it; * * I am putting this money in to help you and Hugh [E. K. Jones] just to save the mill. When I get my money out and these debts paid I will return this deed to you; it will come back to you.' My mother said, 'Then give me a written statement to that effect.' She says, 'You have nothing in the deed like that.' She says, 'Give me a written statement to that effect.' Ira Jones said, 'No, we can't do that; that wouldn't be valid.' "

The significance of the statement said to have been made by Ira Jones becomes apparent when we remind ourselves that he was probably acting as the legal adviser of Emma J. Jones and her husband. Obviously, it is fair to assume that Ira Jones had knowledge of the real purpose of the conveyance, whatever it may have been. If the deed was in truth intended to serve as a mortgage, it is difficult to conceive of a rational and consistent reason for the statement ascribed to Ira Jones, the attorney; but, on the other hand, if the instrument was designed to be what it purports to be, the advice given by him becomes intelligent and entirely consistent with outward appearances.

W. P. Shannon, a brother of Emma J. Jones, testified that two or three days before the execution of the deed he learned from Elihu and John that they had been endeavoring to persuade Emma J. Jones

to execute a deed to John, but without success. He says that Elihu and John requested him to intercede with his sister, and if possible persuade her to sign the deed, and that he did interview his sister, with the understanding on his part that John would take over the mill and operate it until the proceeds of the business paid the mortgage and other accounts, and that upon the payment of all the indebtedness John would reconvey the sawmill property to Emma J. Jones. This witness testified that he advised his sister "to take a deed reconveying the property to her and have it placed in escrow"; and that "it was about three days before I got her to agree to it." Shannon also stated on cross-examination that "a part of the proposition" he was to make to his sister was the execution of a reconveying deed which was to be placed in escrow. According to the testimony of Shannon, a few days after the deed in controversy was signed he heard a conversation between Elihu and John, in which the main subject of discussion "was concerning the request of my sister that they would furnish her some paper or other that would show that this was a deed of trust." No other witness speaks about a deed in escrow, and there is no evidence that such a deed was ever executed. The defendants point out certain inconsistencies which they say become manifest if the testimony given by W. P. Shannon is compared with that given by his two nieces.

There was considerable testimony concerning conversations in which John is said to have made statements amounting to express or implied admissions that Emma J. Jones owned an equity in the sawmill property. Most of this testimony relates to conversations about a release to which the plaintiffs say John from time to time importuned their mother

to attach her signature. The plaintiffs contend that their parents never signed any release. The defendants insist that a release acknowledging the settlement of all business transactions was signed by Elihu and his wife on December 20, 1899. Lillian testified that four or five years after the execution of the deed, John told her mother that the mill was going behind, and that he offered Emma J. Jones \$100 if she would sign the release—

“So I can make some disposition of the property and do with it as I please, and then I can get my money back and yours, too, and he still urged her to sign it, offering her the money, but she wouldn’t sign it.”

This witness also testified that a few months after the last-mentioned conversation John offered her mother \$200 if she would sign a release, but that her mother said: “I won’t sign it for \$200.” Grace says that she was present when her uncle offered her mother \$100 for her signature to a release, but that her mother said “that she wouldn’t sign it, that she thought that her equity in the mill was worth more than \$100 and she was not going to sign it away for \$100.” Grace also told about a conversation occurring in 1905, in which her mother asked John, in the presence of her sister Marietta, “when he was going to deed the mill back,” and that he responded by saying that “they hadn’t got their money out and he didn’t know just when they could, and if she had signed the release, why, things might have been different.” Marietta corroborated her sister by testifying that she heard her uncle say that had her mother “signed a release things would have been settled, but as things looked that he didn’t know when they would be, the way things looked.” Arthur says that “around about 1900” John offered

to give his mother a clear deed to the home in which she lived if she would sign a release, and that "she told him she would not, and that she had told him before she would not, and never would and said also that she had lost everything that she had, to save the mill, and that she wouldn't sign the very last thing she had away." In addition to the testimony of the four plaintiffs, William Paetz, L. A. Young and W. H. Roberts gave evidence about statements which they said were made by John. In the fall or early winter of 1895, according to the testimony of William Paetz, John said, "I got a deed of trust from" Elihu. L. A. Young stated that a few days after the execution of the deed he heard John say, in the presence of J. D. Young, that he had taken care of the mortgage (Withington mortgage) so that "the E. K. Jones Lumber Company should stay in business," and that "he had redeemed that" because "he wanted to save this piece of property for" Elihu. It appears from the record that this witness and Herman are not on friendly terms, and have not spoken to each other for years. W. H. Roberts was another witness for the plaintiffs; but the cross-examination more than neutralized his testimony given on direct examination, and in reality, when considered in its entirety, the testimony of Roberts strengthened rather than weakened the position taken by the defendants.

There was also some evidence which the plaintiffs say shows admissions by Herman, who has been the manager of the mill since the early part of 1899. L. A. Young said that he had heard Herman say "that his father had taken over this debt to secure this property for E. K. Jones." Arthur testified that three or four months after the occasion when

John offered his mother a deed to the home place if she would sign a release, he was visiting at the home of Herman, and that the latter, in the presence of H. M. Bush, who is now dead, asked the witness if he could get his mother to sign a release, and then stated, "I think that is the best thing she can do." Herman vigorously denied any such conversation and gave detailed reasons for claiming that such a conversation never occurred. Moreover, the testimony of Arthur must be read in the light of a letter addressed by him on March 14, 1915, to Herman, in which the writer asks a favor, and from which the reasonable implication is that the writer had no claim upon the sawmill property.

The defendants also rely upon evidence of oral admissions, which they claim were made by Elihu and Emma J. Jones. W. H. Grindstaff testified that Elihu told him—

"That his financial condition was so that he was figuring on selling the mill to John; * * that he would rather have him own the property than an outsider"; and shortly after Elihu "stated that he had sold the mill to J. H. Jones for the reason that he understood that other people were figuring on getting hold of it, and he repeated that he would rather see his brother own the mill than an outsider."

Elizabeth stated that "within a very few days" after the execution of the deed Elihu told her that "he had sold, he and Emma, all their interests in the mill and the mill business to my father." J. H. Struble testified that in 1912 Elihu said "that he had sold out to John a long time ago." Birdie Schalk testified that Emma J. Jones said to her on one occasion:

"Your father is going to save his \$100,000 worth of property, but we have lost all of our property, and I sometimes think that Hugh has no more business sense than a child."

If the controversy were to be decided solely upon the testimony of conversations and oral admissions, it might be said that the plaintiffs had made out the stronger case. But the litigation cannot be determined on this character of evidence alone, for there is much additional evidence which harmonizes with the contention of the defendants rather than with that of the plaintiffs.

Before noticing other prominent features of the record, we shall first point out the condition of Elihu's finances in September, 1895. The Withington mortgage was overdue, and the mortgagee was insisting upon payment and threatening foreclosure proceedings. On May 2, 1895, F. F. Winters secured a judgment against Elihu and others for \$723.65, with interest at 10 per cent from December 8, 1892, together with costs. In August, 1895, William Paetz began an action to recover \$550 with interest, and he caused the sawmill property to be attached.

The deed states that \$1,600 is the consideration; but the defendants contend that the conveyance was made to John with the understanding that he would pay the Withington mortgage and other debts; and the defendants also say that Elihu preferred that his brother should have the property rather than it should fall into the hands of outsiders. Herman testified that a few days before the execution of the deed he heard his father and uncle discussing the terms of the proposed sale, and that, in addition to the payment of cash, the amount of which he did not remember, his father was to satisfy the mortgage, pay the Paetz claim and the Winters judgment, and

assume a debt which Emma J. Jones owed to the E. K. Jones & Company. The record shows that John paid the Winters judgment on September 18, 1895, and that he paid the Paetz claim on the same day. The ledger of E. K. Jones & Company, discloses that Emma J. Jones owed \$258.96, and, in figures which "look like J. D. Young's," the ledger indicates that John assumed that debt; and the journal "says that \$258.96 was charged to J. H. Jones account; and Emma J. Jones account was given credit for that same amount \$258.96." The Withington mortgage was fully paid in 1902 by the John Halsey Jones Company. The two plaintiffs, who were present when the deed was signed, say that no cash was paid at that time. There is no evidence of the payment of any cash, except the testimony of Herman, already referred to, and the recital in the deed.

The plaintiffs argue that the value of the sawmill property was greatly in excess of \$1,600, the consideration in the deed, plus the amount of the debts paid by John, and that this circumstance speaks loudly in support of their contention. Two witnesses, W. P. Shannon and L. A. Young, stated that the property was worth about \$50,000 in 1895; but B. D. Sigler, who was in the sawmill business in 1895 and is now engaged in the business of appraising real estate, testified that the property was worth from twelve to fifteen thousand dollars in 1895, and that the mill's capacity was from twenty-five to thirty thousand feet per day. James Muckle, a sawmill man, said that in June or July, 1895, he offered Elihu and J. D. Young \$12,000 for the sawmill property, but that they wanted \$18,000. Muckle also testified that the property was worth from twelve to fifteen thousand dollars at that time. Herman, who

is of course materially interested, says that the property was not worth more than \$15,000, and that the average daily cut in 1895 was 18,703 feet. L. A. Young says the mill made a little money in 1893, but none in 1894 or in 1895. Herman states that the mill lost money from 1892 to 1895, inclusive. The uncontradicted evidence is that money was scarce, and the lumber business was extremely bad in 1895. The Jones mill was operating only about three days in each week during the year. Indeed, some of the sawmills were shut down and were not operated at all. Appraising the property as of September, 1895, and fixing extreme minimum and maximum valuations, we think that the property was worth not less than \$12,000, and not more than \$20,000; and, furthermore, it is very doubtful whether the sawmill property could have been sold for the amount due on the Withington mortgage, if it had been disposed of by the sheriff under a writ of execution.

Plaintiffs claim that John recognized Emma J. Jones' equity by paying a monthly rental of \$30. There is evidence to the effect that many monthly payments of \$30 were made by John, and that these payments were made sometimes to Elihu, and sometimes to Emma J. Jones. There is evidence in behalf of the defendants to the effect that John, on the night before his death, told Elihu that he had asked Herman "to be good to him." Herman continued to make monthly payments after his father's death. The books of the lessees of the mill property show that the rentals were paid to John until he conveyed to the John Halsey Jones Company, and from that time the rentals, according to the books, were paid to that company. Every witness, who at any time saw any of these monthly payments made, says that in no instance was a receipt given by Elihu, and yet a

receipt appears to have been taken from Elihu whenever he was paid wages for work done in the mill.

We now come to a consideration of the evidence offered in behalf of the defendants concerning the release which they claim was signed on December 20, 1899. It will be recalled that much of the evidence offered by the plaintiffs included oral admissions ascribed to John, and necessarily involved the theory that Elihu and Emma J. Jones did not sign a release, for the reason that much of this evidence related to conversations said to have occurred after December 20, 1899. A search was made for the release, but it was not found. Not long before his death John burned some of his papers. Guy G. Willis was called as a witness and he said that in 1895 he acted as attorney for John, but that he had since retired from the practice of law. Willis testified that when he closed his law office he preserved his files and stored them. After the commencement of this suit, at the request of the defendants, he made an examination of his files, and discovered among the papers an instrument which he states is a copy of the original release which was signed by Elihu and Emma J. Jones. He explained that it was his custom, whenever a paper was signed in his office, to make a copy of it, and to fill in the blanks after the original was signed and to place the copy with his office files, after giving it a file number. The paper produced by Willis as his office copy purports to be a transcript of a formal release. Three blanks are filled with writing made with a lead pencil; one with "20," indicating the day of the month; another with the words "two hundred"; and still another with the figures "200," indicating the consideration for the release. At the bottom was writ-

ten with a lead pencil "E. K. Jones" and "Emma J. Jones." Willis testified that Emma J. Jones "claimed that she hadn't got as much money as she ought to have gotten * * for the purchase price of the mill property and she felt she ought to have had more money out of it." Willis said that he advised John that it was not necessary to procure a release, because "he didn't owe them anything"; but that the latter "thought it was worth a small amount to avoid any trouble or question between E. K. Jones and his family, he'd rather pay something than have any hard feelings in the matter." Willis states positively that the release was signed by Elihu and his wife, and that John paid them for the release. Willis was corroborated by Charles H. Chance, who is now city attorney of Lewiston, Idaho, but in 1895 was working as a clerk in Willis' office. Chance testified that he remembered about Elihu and Emma J. Jones coming to the office for the purpose of signing the release. He says that he prepared the original release and the carbon copy, and he identified the "red ink figures 2695," appearing on the copy and indicating the file number, as his handwriting. Herman also testified that he was present and saw the release signed, and that the purpose of the transaction was to satisfy the "dissatisfied feelings" of Emma J. Jones. Birdie stated that she was present on one occasion when Elihu told her father that "Emma had sent him to say that she was not satisfied with the price that father had paid for the mill and stock." W. H. Grindstaff testified that Elihu at one time told him "that his wife and children were not altogether satisfied with the amount of money they had received for the mill," and that shortly afterward he saw Elihu again and "he told me that he and his wife had seen J. H.

Jones, and that he had paid his wife some money * * and that she was perfectly satisfied and so was he." Grindstaff also stated that, not long after the second conversation with Elihu, he was in John's office on some business with reference to insurance, and John showed him the typewritten receipt signed by Elihu and Emma J. Jones, and that then "he turned it over to Mr. Rogers who was then bookkeeper at the mill." J. T. Rogers was the bookkeeper in the mill from 1895 until some time after 1899; but his testimony was not available because he died two or three years prior to the trial. We would not be warranted, in the face of all of this evidence, some of which comes from disinterested witnesses, in finding that the release was not signed by Elihu and Emma J. Jones.

It is true that some of the plaintiffs tell about conversations, one of which was as late as 1905 or possibly as late as 1906, between their mother and John in which she asked him when he was going to reconvey the mill, and he answered to the effect that he had not yet gotten his money out of the mill; but it is also true that no demand for an accounting was made prior to the commencement of this suit. One of the plaintiffs says that Elihu spoke to Herman about returning the mill, and Herman assured Elihu that the mill would be returned when Herman got his money out of it. Herman denies that he ever promised to reconvey the sawmill property, and he and the other defendants asserted that not until the commencement of this suit did they hear of the contention now made by the plaintiffs.

The delay of the plaintiffs in asserting their claims argues strongly against them. John did not die until more than ten years after the execution and delivery of the deed, and this suit was not com-

menced until April, 1917, or more than eleven years after John's death. In other words, nearly twenty-two years were permitted to pass before any demand for an accounting was made. The plaintiffs admit that neither they nor their parents ever demanded an accounting from John, and they also admit that they never asked that an accounting be made by Herman until the commencement of this suit. After the Jones Lumber Company acquired the assets of the E. K. Jones & Company, it caused the signs to be changed so as to notify all persons that the mill was being operated by it. Since 1895, the mill has been greatly improved. Its capacity has been doubled. The deed of 1895 transferred 3½ acres to John. Since that time an additional 10½ acres have been purchased, so that now the sawmill property includes about 14 acres. After 1895, John treated the E. K. Jones & Company stock standing in his name as his own. After the execution of the deed and during the remainder of his life John always treated the sawmill property as his own property. In 1902, the John Halsey Jones Company, which was only a holding corporation for John, mortgaged the sawmill property to the Security Savings & Trust Company for \$8,000, and in this mortgage the John Halsey Jones Company covenanted that it had "a valid and unincumbered title in fee simple to said premises."

Elihu and his wife lived in the same home from 1892 until they died. This home was near the sawmill and was where they could not but see what was being done in and around the sawmill property. It must be remembered that the plaintiffs contend that the mill was to be returned whenever the debts were paid; and yet, notwithstanding the change made in

the signs when the Jones Lumber Company began to operate the mill, and the material improvements in the mill, and the substantial enlargement of the mill-yards and all the outward appearances of prosperity, no demand was made by any person upon any person for an accounting until nearly twenty-two years had passed.

2, 3. The voluminous transcript and the numerous exhibits accompanying this appeal have been examined, studied and considered with a full realization of the importance which a decision of this litigation must have for the parties to it; but after giving to the record our most careful consideration, we are unable to say that the plaintiffs have sustained the heavy burden which the law imposes upon a party who claims that an instrument, in form a deed, is in reality a mortgage: *Harmon v. Grants Pass Banking & Trust Co.*, 60 Or. 69, 74, 80 (118 Pac. 188).

The decree appealed from must be affirmed, but without costs in this court.

AFFIRMED.

JOHNS, BENSON and BURNETT, JJ., concur.

Argued June 19, reargued October 14, affirmed December 23, 1919,
rehearing denied May 18, 1920.

STATE v. BUTLER.*

(186 Pac. 55.)

Criminal Law—Failure to Show by Record Disposition of Demurrer not Ground for Reversal.

1. In view of Section 1626, L. O. L., providing that on criminal appeals the court must give judgment without regard to technical errors or defects, in a prosecution resulting in conviction of manslaughter, formal disposition of demurrer to the indictment was not so essential that silence of the record thereon constitutes a fatal defect, where defendant afterward entered plea of not guilty, and went to trial without objection or question.

Homicide—Threat Admissible in Evidence Though not Directed Especially to Deceased.

2. In a prosecution resulting in conviction of manslaughter, testimony of decedent's father that about eight months before the shooting defendant had said to him that, if he could not beat them any other way, he would do it with a Winchester, *held* admissible as a threat over objection that it was not directed especially toward deceased and was too remote; such threat having reference to a controversy about a road pursuant to which decedent was subsequently killed.

Criminal Law—Testimony of Arrangement in Defendant's Absence not Hearsay.

3. In view of Section 707, L. O. L., recognizing *res gestae* both as to facts in dispute and as to some act that becomes important as evidence of facts in dispute, in a prosecution resulting in conviction of manslaughter, the controversy having originated over a fence across a road, testimony tending to show the arrangement with other persons under which decedent came to be at the scene of the shooting on watch to see who was putting up the fence *held* not incompetent hearsay because arrangement was made in defendant's absence.

Criminal Law—Homicide—Evidence of Other Crime as Showing Identity.

4. In a prosecution resulting in conviction of manslaughter, the killing having taken place at defendant's fence, which he was put-

*The question of evidence of other crimes in criminal cases is discussed in a note in 62 L. R. A. 193.

On evidence in a criminal case of threats of accused or of person killed or injured, see note in 17 L. R. A. 654.

On responsibility for crime committed in fit of anger, see note in 10 L. R. A. (N. S.) 1032.

Authorities passing on the question which will reduce or mitigate the degree of homicide are collated in a note in 5 L. R. A. (N. S.) 809.

ting up nightly to obstruct a road, decedent with others having been on watch to find out who was doing it, testimony of such others as to what occurred probably half an hour before the killing on the other side of the field from where the killing occurred, where the road went through the fence on that side, and that defendant then drew gun on the others when they were coming close enough to identify him, *held* admissible, and not objectionable as showing a collateral offense, and sufficient to justify the jury in concluding it was defendant.

Homicide—Declarations by Accused as to Position in Firing.

5. In a prosecution resulting in conviction of manslaughter, testimony of a deputy sheriff as to where defendant showed him he was when he fired the last shot at decedent, and about how far the place was from the panel in his fence, open on account of a road, which he had been putting up nightly, so that decedent with others had volunteered to watch for him, also how far the place was from that where empty shells were found, *held* admissible.

Criminal Law — Homicide — Argumentative Instruction on Self-defense.

6. In a prosecution resulting in conviction of manslaughter, instruction on the right of self-defense arising from an assault or attack with a dangerous weapon *held* properly refused as argumentative and invading the province of the jury.

Homicide—Harmless Error in Refusal of Instruction.

7. In a prosecution resulting in conviction of manslaughter, the refusal to defendant of his requested instruction referring to malice and ill will *held* harmless to him in view of the verdict negating the existence of malice or ill will on his part.

Criminal Law—Following Language of Requested Instructions.

8. The trial court is not required to give charges asked for in the exact language in which they are requested, but need only cover the principles of law involved.

Homicide—Killing Manslaughter Unless Justifiable or With Malice or Deliberation.

9. Every killing is manslaughter unless it is justifiable or excusable, or is accompanied by malice or deliberation, when it becomes murder in the first or second degree.

Homicide—Killing in Anger Without Excuse or Justification is Manslaughter.

10. If defendant under provocation of a sudden attack grew angry and killed decedent without real or apparent necessity, the killing was not justifiable or excusable, and defendant was properly convicted of manslaughter.

Homicide—Evidence Sustaining Conviction of Manslaughter.

11. In a prosecution resulting in conviction of manslaughter, defendant having shot and fatally wounded decedent, who was watching a road through defendant's land to see if he was the

one who was putting up an obstructing fence every night, evidence *held* sufficient to sustain the verdict.

Criminal Law—Reading Instructions Together.

12. Instructions must be read together, and cannot be considered each by itself.

Homicide—Instruction on Threats not Abstract.

13. In a prosecution resulting in conviction of manslaughter, instruction as to the consideration of threats made by defendant against decedent in determining defendant's intent and malice *held* not erroneous as abstract; there being some evidence of threats.

Criminal Law—Argument of District Attorney.

14. Though the language of the district attorney in argument was bitter and somewhat intemperate, reversal is not justified on that account alone.

Criminal Law—Instruction not Coercing Jury—"Stubborn."

15. In a prosecution resulting in conviction of manslaughter, instruction to the jury by the court on their inability to agree, sending them back for further consideration, and urging them to try to agree, if possible, *held* not erroneous as coercive, despite the expression admonishing them not to get stubborn and say they would not; "stubborn" meaning "unreasonably unyielding."

Homicide—Instruction on Self-defense.

16. In view of Sections 1371, 1909, 1914, L. O. L., in a prosecution resulting in conviction of manslaughter, instruction on self-defense *held* not erroneous in its limitation of defendant's right to take his adversary's life only to cases of threatened deadly harm or severe calamity "felonious" in character; the word "felonious" having been used as synonymous with great bodily injury.

Criminal Law—False Assumption in Argument of District Attorney.

17. In prosecution resulting in conviction of manslaughter, the assumption by the district attorney in argument that certain witnesses had identified defendant in a certain place on the night of the killing *held* not reversible error as more in the nature of a misconstruction of the testimony than a positive and willful misstatement; the charge having instructed the jury to disregard statements not sustained by evidence.

From Jackson: FRANK M. CALKINS, Judge.

In Banc.

The defendant was indicted and charged with the crime of murder in the second degree. He was tried and convicted of the crime of manslaughter, and received an indeterminate sentence of from one to fifteen years.

The killing itself is not denied by the defendant, and grew out of the following facts: The defendant was the owner of a tract of land near Eagle Point in Jackson County, which was inclosed by a fence. For some time prior to the killing, there had been a controversy in the neighborhood over a road running through this tract of land, and as to whether such road was a valid county road. McDonald Stewart, the individual killed by defendant, was a neighbor living with his father near one side of defendant's tract of land and apparently interested in the opening of the road in question. The road supervisors, ostensibly under authority from the County Court, had opened the fence on each side of defendant's tract of land where the road went through, a number of times prior to the killing. The fence would remain open during the day, but would be put up again in the night. It appears to have been the belief of some of the people who lived in the neighborhood, that the defendant was putting up the fence, and he had been threatened with prosecution for closing the alleged county road. The defendant, on the other hand, claimed that some third party was the individual who had been putting up the fence at night, and that it was done for the purpose of getting him into trouble.

On the night in question the supervisor had arranged with McDonald Stewart, the deceased, and with a Mr. Jackson, who also lived in the neighborhood, to watch the fence, for the purpose of settling the question as to who was putting it up at night. The road ran through the field from west to east, and it was arranged that the supervisor and Jackson were to watch the fence on the west side, while the deceased was to watch it on the east side. At first it was intended that another neighbor, by the

name of Patrick, should share with Stewart in watching the fence on the east side, but he was not able to go and the deceased went alone.

Dutton, the road supervisor, and Jackson went up to the vicinity of the fence on the west side that evening in an automobile, accompanied by Mrs. Jackson, stopped the automobile under a tree, and waited. Dutton and Jackson walked a short distance over toward the fence. It was a moonlight night and presently they saw a man come to the gap of the fence and commence putting it up. They went back to the automobile and drove it up to the vicinity of the gap, but by this time there was no one in sight. They got out of the automobile and started along the fence, Dutton apparently being in the lead. Presently they saw a dark object, which they took to be a man, behind the fence about 30 feet away, but so hidden by the fence that they could not identify him. Mr. Dutton continued to advance until he got within about 15 feet of the man, who then partly raised up and pointed a gun at Dutton over or through the fence. Dutton said, "For God's sake, don't shoot me over this fence," and stepped back two or three steps. The person in the fence then turned the gun on Jackson, who also turned back, and they both walked to the car, got into it and went home. This occurred between 7:25 and 8:25 o'clock—probably from the testimony, about 8 o'clock. Dutton and Jackson could not identify the person in the fence, but in a general way they described his clothing and they noticed in the moonlight the polished brightness of the gun barrel. The shooting occurred near the gap on the east side where McDonald Stewart was watching.

About 9 o'clock that night, or a little before, the defendant telephoned to the sheriff from his home about the shooting. He claimed that after the shooting he had walked from the place where it occurred down to his house before telephoning, so that the shooting may be assumed to have occurred somewhere in the neighborhood of 8:30, or possibly a few minutes later. The defendant claimed he was walking along down a fence in the vicinity of the gap when someone fired two shots at him. He claims that, at the second shot, he saw the flash from behind the tree, about 100 feet away; that he then fired himself, two shots toward the point where the flash had occurred; that a third shot was then fired from the tree and hit the fence close to where he stood; that he then got down behind the fence, and seeing a dark object, which he took to be part of a man's person, behind the tree, fired a third shot, when the man behind the tree fell and uttered some sound, which indicated to the defendant that he was hit. The defendant then, as he says, got up and walked down to his home and telephoned to the sheriff.

The defendant at the time of the trial claims he did not move down the fence toward the south after the third shot was fired by the other man; but there was testimony tending to show that on the night of the killing he told Anderson, the deputy sheriff, that he had crawled down the fence until he came to a place where he could see the black spot, which he took to be part of the man's person behind the tree, before he fired the fatal shot. According to Anderson's testimony, defendant showed him on the ground about the point from which he fired this shot; and Anderson estimated the distance as about 90 feet from the gap. Two discharged shells were found the next morning at the gap in question, and

it was the theory of the state that the defendant—after firing these two shots and after the last shot was fired by the deceased—crawled along down the fence out of sight of the deceased, until he got far enough past the direct line of the tree so he could see the deceased behind the tree, and then deliberately took aim and fired the shot in question.

The deceased made no statement and there was no direct evidence as to what occurred at the time of the shooting, except that of the defendant himself. The state depended upon the circumstances surrounding the transaction to show that the defendant was the aggressor, or at least that he fired the last and fatal shot when it was unnecessary and could have been avoided without danger to the defendant. The defendant, on the other hand, admitted the shooting but claims he acted entirely in apparently necessary self-defense, and only to protect himself from danger of death or great bodily harm.

From the verdict of manslaughter only, it must be supposed the jury found that the killing was not entirely justified or excusable; but that there was no malice, or at least no sufficient evidence of malice, on the part of the defendant.

The deputy sheriff arrived at the place of the killing about 11 o'clock. According to the testimony, no one went there until the sheriff arrived. The doctor did not get there until about midnight. The deceased was still alive at 11 o'clock when the deputy sheriff arrived, but he died a short time afterward and before the arrival of the doctor. The bullet had passed through the thigh, shattering the thigh bone. According to the testimony of the physician, death was caused by hemorrhage.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. O. C. Boggs*.

For the state there was a brief with oral arguments by *Mr. George M. Brown*, Attorney General, and *Mr. George M. Roberts*, District Attorney.

BENNETT, J.—There are about 25 assignments of error, referring chiefly to the rulings of the court as to the introduction of evidence and the instructions given and refused.

1. It appears, however, from the record that the defendant was arraigned and filed a demurrer to the indictment and that he afterward entered a plea of not guilty and went to trial. The original record did not show affirmatively what disposition was made of the demurrer. The defendant now urges this as a fatal defect in the trial proceedings, but it is a very technical contention and, we think, is without merit.

The case of *State v. Walton*, 50 Or. 142 (91 Pac. 490, 13 L. R. A. (N. S.) 811), and *State v. Cartwright*, 10 Or. 193, cited by appellant, do not seem to be in point. In the *Walton* case there had been no *plea* to the indictment, and in the *Cartwright* case the question was whether or not it was necessary for the record to show that the defendant was present at the trial. In the case at bar both of these facts appear fully from the record. We think the formal disposition of the demurrer was not so essential that the silence of the record thereon would constitute a fatal defect, where the defendant afterward entered a plea of not guilty and went to trial without objection or question: *State v. Sullivan*, 52 Or. 614 (98 Pac. 493). The indictment in this case was

in the usual form and seems to have been entirely regular and sufficient.

Section 1626, L. O. L., provides that on criminal appeals the court "must give judgment without regard * * to technical errors, defects or exceptions which do not affect the substantial rights of the parties." Here, the indictment being entirely sufficient, the failure of the court to formally pass upon the demurrer could not possibly prejudice the defendant in any way. The provision of the statute is, therefore, entirely controlling, and the case cannot be reversed upon such a technical omission of formal proceedings: *State v. Pender*, 72 Or. 94 (142 Pac. 615); *State v. Leonard*, 73 Or. 451 (144 Pac. 113, 681). Besides it appears from a supplementary transcript filed in this court that the demurrer was in fact overruled, but that the clerk by some inadvertence overlooked the entry at the time in the journal and it is now remedied by an order entered *nunc pro tunc*.

2. Mr. H. J. Stewart, father of deceased, testified that about eight months before the shooting the defendant had said to him:

"If I can't beat you fellows any other way, I will do it with a Winchester."

It is urged that this threat was inadmissible because it was not directed especially toward the deceased, and because—as is claimed—it was too remote. We think this contention cannot be sustained under the circumstances of this case. On cross-examination the witness stated:

"I asked Mr. Butler what he intended to do *about the road*, and he said he wasn't going to do anything. I told him then we would have to commence suit to open the road. I started home and then is when he made the statement: 'If I don't beat you

fellows any other way, I will do it with a Winchester.' "

From this testimony we think the jury had a right to infer that the threat, if made by defendant as alleged, had reference to the controversy about the road, over which the killing occurred, and that it referred generally to all the "fellows" who were pressing the opening of the road.

The authorities cited by appellant are not applicable to a case like this and do not support his position. In the case of *State v. Meyers*, cited from the 57 Or. 50 (110 Pac. 407, 33 L. R. A. (N. S.) 143), the threat which the court held was erroneously admitted, did not refer in any way to the transaction over which the deceased was killed, or to any class to which he belonged. The opinion in that case carefully excepts a case like this in the following language:

"And threats against a particular class of persons, as, for instance, a threat to kill all policemen, are admissible in a prosecution for killing a member of the particular class indicated in the threats."

Here the threat was clearly broad enough to have reference to everyone who was pressing and enforcing the opening of this road; and it had reference apparently to the very controversy about which the killing occurred.

3. Testimony was admitted over the objection of the defendant tending to show the arrangement under which the deceased came to be at the scene of the shooting; and it is urged, that because this arrangement was made in the absence of the defendant, it is hearsay and incompetent, but we think this is entirely settled adversely to the defendant by the late case of *State v. Farnam*, 82 Or. 211 (161 Pac. 417, Ann. Cas. 1918A, 318), in which case the

defendant was charged with the killing of one Edna Morgan, who appears to have been his sweetheart, and it was the theory of the state that the killing was on account of the deceased's unfortunate condition, and that the defendant, for the purpose of avoiding the consequences to himself, had either voluntarily and intentionally killed her, or unintentionally done so in the attempt to produce an abortion. It became important to show where the young girl went on the evening of the killing and her purpose. A witness was called and asked:

"Now tell the jury what Edna told you about going home with you that evening."

The witness answered:

"She said she could not come because she thought Roy was coming down."

Mr. Justice HARRIS, in an opinion, which was concurred in by a majority of the court, considers and discusses all of the authorities carefully and at great length, and reached the conclusion that the testimony was properly admitted, saying:

"If the doing of an act is a material question, then the existence of a design or plan to do that specific act is relevant to show that the act was probably done; * * and, considering the plan or design as a condition of the mind, a person's own statements of a present existing state of mind, when made in a natural manner and under circumstances dispelling suspicion and containing no suggestion of sinister motives, only reflect the mental state, and therefore are competent to prove the condition of the mind, or, in other words, the plan or design * * . The whereabouts of Edna Morgan was a material issue. It was important to show what she did and where she went. The state contended she met the defendant and accompanied him to the Beamer barn. Evidence of her declaration was competent to show what was

in her mind, and that what she intended to do was probably done. * * The language used by her was only one way of stating that she intended to meet Roy Farnam. * * However, as the writer thinks, the true theory of the rule is that the statement of the deceased is original evidence of her intention, which the jury can consider as a circumstance indicating that she probably did what she intended to do, then on that theory no section of the Code is transgressed. * * Being competent to show what Edna Morgan intended to do, the testimony of Mabel Barton was not rendered incompetent for all purposes merely because it was incompetent for the purpose of connecting Roy Farnam with the alleged crime.”

Here, as in the Farnam case, the evidence was offered not for the purpose of binding the defendant in any way, but for the sole purpose of explaining how the deceased came to be at the point in question, at the time in question, and what was his purpose and intention in being there.

Section 707, L. O. L., is in direct line with the conclusion of Mr. Justice HARRIS in the Farnam opinion. It provides:

“Where, also, the declaration, act, or omission forms part of a transaction which is itself the fact in dispute, *or evidence of that fact*, such declaration, act, or omission is evidence as part of the transaction.”

This section recognizes two cases of *res gestae*—one the *res gestae* of the fact in dispute, and the other the *res gestae* of some act that becomes important as evidence of the facts in dispute.

Here, the act of the deceased in going to and being at the place where the killing occurred, and his purpose in going there, became very important; and it was entirely proper to show by his declarations at the time and as a part of the transaction, *of going*

down there, what was the plan and purpose for which he went.

4. The testimony of Dutton, Jackson and Mrs. Jackson, as to what occurred probably half an hour before the killing at the point on the other side of the field from where the killing occurred, where the road went through the fence on that side, was admitted in evidence, and it is claimed that this was also error. This contention also must be overruled. The testimony was entirely sufficient to justify the jury in concluding that it was the defendant who was putting up the fence on that side, and who drew the gun on Jackson and Dutton when they were about to get close enough to identify him. It is true they were not able to say that defendant was the man; but it may have seemed to the jury unlikely and improbable that there were two men out there in the night-time, with guns, at the different gaps in the fence within half an hour's time. While not able to identify the defendant, these witnesses were able to describe, in a general way, the clothes which the man wore, and the gun seems to have had a peculiar bright and polished barrel. The clothes which the defendant wore on the night in question were described by the witnesses, and indeed they were seen and inspected by the jury; and the jury had an opportunity to compare the description of them made by the different witnesses. It seems entirely reasonable for the jury to have concluded then, that the person at the west side of the fence was the defendant.

The conduct of the defendant at that time and place was really a part of the transaction which led up to the killing. It was a circumstance tending to show the motives and feelings of the defendant, and tended to show inferentially, what occurred a few

minutes later at the other side of the field, when the deceased was killed; and to show who was the aggressor in the fatal affray. It tended to show that the defendant was the person who had been putting up the fence, and with his other declarations, that he was intending to cover up his identity; and the jury had a right to draw the inference, that he had the gun with him that night, for the purpose of preventing anyone from getting close enough to him to identify him; and from his actions there and from the plan and purpose of the deceased in going down there to watch the fence and identify the person who was putting it up that night, and from the other circumstances, the jury had a right to reason out as best they could what probably really happened between the deceased and defendant at the precise minute of the shooting. They had a right to wholly disregard all or any part of defendant's story as to who was the aggressor if they believed it unreasonable or improbable under the circumstances.

The cases cited by appellant upon this question are clearly and obviously distinguishable from the case at bar. Here the evidence was not offered for the purpose of showing that the defendant had committed another crime; but because it had a direct bearing upon the crime charged in the indictment.

In the cases cited by appellant the collateral offense sought to be proved was entirely disconnected from the crime charged. This case is much more nearly like the case of *State v. La Rose*, 54 Or. 555 (104 Pac. 299), than it is like the cases cited by appellant. In the *La Rose* case the defendant was charged with the killing of one Hyman Newman, with a piece of rusty gas-pipe wrapped in a newspaper; and it was shown that about 16 hours before the defendant had struck a man by the name of

Herman on the head with a weapon wrapped in the same way; and that within about 24 hours after, he had struck and robbed a Chinaman with the same kind of a weapon wrapped in the same way; and it was held by a unanimous court that the testimony was admissible.

If testimony like that, in this case, of the conduct of the defendant in regard to the same controversy, and at a time so immediately before the killing, was not admissible for the purpose of showing his feeling and motive and intent at the time of the killing a few minutes afterward, at the other side of the same fence and at the other end of the same road, and in regard to the same general transaction, with reference to a person who was trying to identify him in the same way, then it would be impossible to convict anyone of a crime on circumstantial evidence, and all one would have to do to go unscathed of justice, would be to choose a time for the commission of a crime when there were no third parties present and no direct evidence; and when his own story would be the only possible direct testimony.

5. The testimony of Paul Anderson, deputy sheriff, as to where Butler showed him that he was when he fired the last shot, and about how far that place was from the panel which had been opened, and from the place where the shells were found, was clearly admissible. The fact that defendant did not tell him in words exactly where he stood, but showed him about where it was, did not make this evidence any the less admissible, although it might have affected the weight of the testimony. His testimony showed clearly that the defendant told him he had crawled down the fence for quite a distance, and this was entirely sufficient to support the charge of the court in that regard.

6. The defendant asked the court to charge the jury as follows:

“An assault or attack with a dangerous weapon will almost invariably justify the killing of the assailant in self-defense, except when it is manifest to the defendant that the weapon cannot or will not be used for the purpose of killing or inflicting great bodily harm.”

And the refusal of this instruction is assigned as error. The instruction was argumentative and invaded the province of the jury. Whether an assault or attack with a dangerous weapon will justify the killing of an assailant will depend upon the circumstances, and is clearly a question for the jury. The court had no right to say to the jury that such an attack “would almost invariably” justify killing.

7. The instruction asked for by the defendant in the eleventh assignment of error might probably have been given by the court, but its refusal could not in any way prejudice the defendant for it referred to malice and ill will, and the jury must have found that there was no malice or ill will, or the verdict would have been for murder in the second degree instead of manslaughter. Besides, the court charged the jury absolutely that the defendant had a right to defend himself, if he was in danger or believed himself to be in danger, to the extent of taking the life of the deceased. One of the charges given was as follows:

“The law gives to every man the right of self-defense. This means, that if a man is assaulted, he may defend his life or his person from great bodily harm. He may repel force by force and he may resort to such force as under the circumstances surrounding him, may be reasonably necessary to repel the attack upon him even to the taking of the life of his adversary.

“If then you should find in the consideration of this case the defendant honestly believed that he was being feloniously assaulted, and did honestly believe that he was then and there in danger of death or great bodily harm, he would be justified in defending himself even to the extent of taking the life of his adversary.

“As I said, it is incumbent upon the prosecutor to prove to you beyond a reasonable doubt that the killing was not done in self-defense, and if, from the evidence offered in the trial of this case, you find that the prosecution has not proved beyond a reasonable doubt that the killing was not done in self-defense, you should find a verdict for the defendant.”

And other instructions given by the court were as absolute in this regard. These charges were equivalent to saying to the jury that if it was necessary, or apparently necessary, to kill the deceased to save his own life, or to save himself from great bodily harm, the defendant was justified in doing so, without regard to malice or anything else.

8. The twelfth, thirteenth, fourteenth, and fifteenth assignments of error were fully and entirely covered by the general charge. It is well settled that the court is not required to give charges asked for in the exact language quoted, and we think the charge given by the court was, on the whole, quite favorable to the defendant and fully covered the principles involved in the charges asked for and refused.

9, 10. The sixteenth assignment of error has reference to an instruction defining manslaughter. It is urged that there was no evidence of manslaughter, and that this instruction was abstract. But every killing is manslaughter unless it is justifiable or excusable; or is accompanied by malice or deliberation, when it becomes murder in the first or second degree.

In this case, if the jury was in doubt as to whether there was any malice and was satisfied the killing was not justifiable or excusable, it was bound to find a verdict of manslaughter. All the circumstances were before the jury, and they may have inferred that the defendant, under the provocation of a sudden attack, grew angry and killed the deceased without any real or apparent necessity. Under such circumstances the killing would not be justifiable or excusable, and the verdict of manslaughter would be sustained.

Section 1902, L. O. L., provides:

“Every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable, as provided in this chapter, shall be deemed manslaughter.”

11. There was ample evidence to sustain a verdict of manslaughter in this cause.

12. The eighteenth, twentieth, twenty-first, twenty-second and twenty-third assignments of error refer to instructions given by the court. We think these instructions, when read together with the others, are substantially correct. Some of the instructions, when taken from the remainder of the charge and read by themselves, might be subject to possible criticism; but in the light of the entire charge this ceases to be true, and we think the charge on the whole was entirely favorable to the defendant.

13. The nineteenth assignment of error refers to the following charge:

“You should also consider the evidence of any threats made by the defendant against Stewart, if any are shown, in aiding you to determine the intent with which the defendant committed the act, and also to aid you in determining the question of malice on the part of the defendant.”

It is urged that there was no evidence of any threats by the defendant against Stewart, but as we have already seen, the threat testified to by Stewart's father was broad enough to cover him, if the jury should find he was one of the persons interested in the opening of this road.

14. We think there is nothing in the record which would justify us in reversing the case on account of the argument of the district attorney. The language may have been bitter and somewhat intemperate, but it seems well settled in this state that such language, when going no further than in this case, will not justify a reversal.

15. Neither do we think the cause can be reversed on account of the instruction to the jury given by the court when they were unable to agree, in which the court sent them back for further consideration of the case, and urged them to try to reach an agreement if possible. The language in no way coerced them. It was nothing more than a fair and proper request upon the part of the court for the jury to give the matter further consideration, and try to reach an agreement, if possible. The language of the court was as follows:

"Now, when you go back I want you to do the best you can to harmonize your differences, and everybody remember that it must be a very severe strain upon a defendant to go through an ordeal of this kind, and he is entitled to a verdict of whatever it shall be, and it is also important that the state shall have a verdict, as we will have to try the case over again if we do not get a verdict, and I want you to try not to lose your tempers and to try your best to harmonize your differences and everybody try to do right and to do what your consciences think should be done but do not get stubborn and say you won't. Sometimes jurors get tired and I know it is hard to ask jurors to do this work but

some jury will have to solve this and so I will ask you to do the best that you can to solve it.”

There seems to be nothing coercive in this instruction. On the contrary, it seems to have been a very temperate and reasonable statement of the duty of the jury to meet each other's views in a reasonable spirit and try to reach a unanimous conclusion if they conscientiously could. There seems to be nothing which would indicate that it was in any way the duty of any juror to give up his honest views or accede to a verdict which he could not conscientiously concur in.

Much stress is placed upon the words admonishing the jurors to not “get stubborn and say you won't.” But this must be referred to what went just before it, in which the jury was told to try “to harmonize your differences, and if possible, try to do right and do what you conscientiously think should be done.” And when read in this light it was entirely proper. One of the meanings of the word “stubborn” given by the International Dictionary is “Unreasonably unyielding.” And this was, evidently from the context, the sense in which the word was used in the instruction.

Judge THOMPSON, in his work on Trials (2 ed.) vol. 3, at pages 2123, 2124, cites with approval three different instructions given by three different courts, in which the same word, or its exact equivalent, is used in a similar instruction in the same way; one being passed upon by the Supreme Court of Nebraska in *Jessen v. Donahue*, 4 Neb. (Unof.) 838 (96 N. W. 639); another by the Supreme Court of Michigan in *Mead v. Harris*, 101 Mich. 585 (60 N. W. 284); and one by the Supreme Court of South Carolina, *Caldwell v. Duncan*, 87 S. C. 331 (69 S. E. 660). It seems well settled in this state, as well as gen-

erally, that the trial court can, with propriety, admonish the jury in a temperate and moderate way, as to its duty in considering a case and in trying to reach an agreement: *State v. Saunders*, 14 Or. 300 (12 Pac. 441); *State v. Hawkins*, 18 Or. 476 (23 Pac. 475). The instruction of the court in this case seems to be well within the rule.

In *State v. Saunders*, 14 Or. 300 (12 Pac. 441), the exact instruction complained of does not appear in the report of the case, but we have examined the record in that case, and the instruction, in so far as it is important on this question, was as follows:

"That it was their duty to try and agree upon a verdict. * * That the court could now discharge a jury when there was no hope of their agreeing on a verdict— * * still it was of great importance that the jury agree and the case be decided and ended. * * That in discussing the case in the jury room, it was the duty of each jurymen to carefully hear and consider the opinion of his fellows; that it might happen that all the jurymen would not remember or view the evidence alike, and they should discuss all matters pertaining to the case freely and with candor—that it was not proper for one jurymen to announce that his views were correct without first considering the opinions of his fellows. If jurors would never in any manner change or modify their impressions after hearing their fellows, verdicts would not often be rendered and the jury system would be a failure. That they would have to remain together and could not separate until they agreed upon a verdict and brought it into court."

In relation to this instruction the court said:

"The objection to the instructions to the jury, as to their duties—telling them the effect of a disagreement at common law, and of how juries were kept together until they did agree; the mitigation of the rule in the United States; and remarking to them that they would have to remain together, and could

not separate until they agreed on a verdict, and brought it into court—cannot be entertained. It was proper for the court to inform the jury respecting their duty; advise them how they should consider the matter before them, and the course to pursue in reaching a conclusion.”

In *State v. Hawkins*, 18 Or. 476 (23 Pac. 475), the court had charged the jury:

“I need not admonish this intelligent jury that it is important to the ends of justice, and to secure public respect for our judicial tribunals, that juries agree upon verdicts in cases submitted to them, so that causes may be determined and new trials and delays of justice avoided.”

This instruction, like the one in the *Saunders* case, was held to be within the fair province of the court and to be no error, the court saying:

“Such instructions announce no principles of law further than to impress upon the minds of jurors the duty of considering the case in all of its bearings fairly and without prejudice, and to endeavor to reach a just conclusion.”

And again:

“It was proper for the court to inform the jury respecting their duty; advise them how they should consider the matter before them, and the course to pursue in reaching a conclusion. * * No intelligent or conscientious juror could be misled by such an admonition. He understands the motive of the court not to be to control or coerce his judgment contrary to his conscientious convictions, or to induce him to yield to the judgment of his fellows without the fullest comparison of all of the facts. It is impossible to see in what manner such advice to the jury could have injured the defendant.”

At the time the instruction was given the jury had not been out an unreasonable time—only about 7 hours—and had not reported they were unable to

agree; but came in to ask the court for further instructions. The case at bar is clearly distinguishable from that of *State v. Ivanhoe*, 35 Or. 150 (57 Pac. 317). In the latter case the jury had been out all night and had reported they were unable to agree. Much stress was laid upon these facts in passing upon the case on appeal. Also, the instruction was much more coercive in its tendency than the instruction in the present case. In that case the trial court dwelt upon the matter at some length and in the course of a long instruction told the jury, among other things:

“That they should listen with a *disposition to be convinced* by each other's arguments. * * A proper regard to the judgment of other men will often greatly aid us in forming our own judgments. In many of the relations of life it becomes a duty to *conform to the opinion of others*, when it can be done without a sacrifice of conscientious convictions. More especially is this a duty when we are called to act with others, and when dissent on our part may defeat and materially affect the rights of third parties. The single object to be effected is to arrive at a true verdict, and this can only be done by deliberation, mutual concessions, *and a due deference to the opinions of each other*. * * Without that, the trial by jury, instead of being an assistance or essential aid in the administration of justice, would become a most effectual obstacle to it.”

It is easy to see that the instruction in that case was far more extreme, and went far beyond the very moderate instruction given by the court in this case. The opinion in the *Ivanhoe* case does not, in any way, overrule the previous opinions in the *Saunders* and *Hawkins* cases, already quoted from. On the contrary, it distinguishes from them upon the ground that in the *Ivanhoe* case the jury had been out a

long time and had come in and reported that they could not agree.

There may be a question as to whether the attempted distinction between the *Ivanhoe* case and the previous cases was well based, but whether there was such a logical distinction for the *Ivanhoe* case upon that ground, or not, it is perfectly plain that there is no such distinction between the case now at bar and those of *State v. Saunders* and *State v. Hawkins*. Here the jury had not failed to agree. On the contrary, they came in for further instruction in relation to self-defense, from which it must be inferred that they were still considering the matter with the view of an agreement. There surely can be no logical distinction between such an instruction, given at this time, and the same instruction, if it had been given before the jury went out at all. The case at bar is clearly distinguished in this regard from the *Ivanhoe* case and is exactly on all-fours in principle with the previous cases. It is very doubtful if this question is properly presented by any exception, and it certainly is not specifically pointed out in the assignments of error; but in any event, there was, it seems to me, no error in the action of the court in this regard.

16. Defendant's seventeenth assignment of error refers to the following instruction:

"The law regards human life as the most sacred of all interests committed to its protection, and there can be no setting up of self-defense, unless the necessity of taking human life is actual, present, urgent, unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from deadly harm or severe calamity felonious in its character, or from all of the circumstances he had reasonable ground

to believe his life or person was in such grave danger."

It will be noticed that this instruction does not make it necessary for the defendant to have been in *actual* danger, but clearly points out to the jury that he had a right to act on the appearance of danger as presented by the circumstances. It is strenuously urged, however, that that part of the instruction which requires the injury to be "felonious in its character" is erroneous in the use of the word "felonious." It is plain that the court used the word "felonious" in this connection as synonymous with "great bodily injury." I think, under our statute, the use of the word "felonious" was not error.

Independent of our statute the court had high authority for the instruction. In the case of *Commonwealth v. Selfridge* (Selfridge's Trial, p. 160), in the Supreme Court of Massachusetts, which seems to have been tried before the full court of that state, Chief Justice PARSONS, in charging the grand jury, said:

"But if the party killing had reasonable ground for believing that the person slain had a *felonious design* against him, although it should appear afterward that there was no such design, it will not be murder but will be either manslaughter or excusable homicide, according to the degree of caution used and the probable grounds of such belief."

And Mr. Justice PARKER, in charging the trial jury, said:

"When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit *any felony* upon his person, the killing of the assailant will be excusable homicide."

In another leading case, *United States v. Wiltberger*, 3 Wash. C. C. 515 (Fed. Cas. No. 16,738), before Judges WASHINGTON and PETERS, Judge WASHINGTON, then an Associate Justice of the Supreme Court of the United States, charged the jury as follows:

“As to this, the law is that a man may oppose force to force in defense of his person, his family or property against one who manifestly endeavors by surprise or violence to commit a felony, as murder, robbery or the like. In this definition of justifiable homicide the following particulars are to be attended to; the intent must be *to commit a felony*. If it would be only to commit a trespass as to beat the party, it would not justify the killing of the aggressor.”

The charge of Mr. Justice PARKER in the Selfridge case was quoted with approval by the Supreme Court of Michigan in *People v. John Doe*, 1 Mich. 451.

In *Brownell v. People*, 38 Mich. 732, Chief Justice CAMPBELL, delivering the opinion of the court, said:

“Any serious bodily harm apprehended from a *felonious* attack—such as mayhem, for example—would not merely excuse but justify extreme resistance.”

In another leading case of *State v. Kennedy*, 20 Iowa, 569, Judge DILLON, one of the greatest judges, unquestionably, who ever sat upon the Iowa bench, said:

“And unless there be a plain manifestation of a *felonious intent*, no assault will justify killing the assailant.”

In the previous Iowa case of *State v. Thompson*, 9 Iowa, 188, it was said by Judge STOCKTON:

"If it is not apparent from the manner of the assault, the nature of the weapon used, and the like, *that the assailant intended to commit a felony*, that the danger was imminent, and that the species of resistance used was necessary to avert it, the party assailed is not justified in resorting to the use of a deadly weapon and using it in a deadly manner."

In *State v. Harris*, 46 N. C. 190, the court below had charged the jury:

"That whenever there are reasonable grounds to believe there is a design to destroy life or to rob or to *commit a felony* the killing of the assailant will be justifiable."

And the Supreme Court affirmed the judgment, saying:

"We see no error in these directions."

In *Johnson v. State*, 136 Ga. 804 (72 S. E. 233), the court below had charged the jury:

"One would not be justified under the law of self-defense in killing another, to prevent the commission of an injury upon him which would amount to nothing more than a misdemeanor."

And the court held that this instruction was not erroneous.

In *Territory v. Baker* (Johns.), 4 N. M. 117, 128 (13 Pac. 30, 41), the court said:

"The phrase, 'great personal injury,' as used in the statute, means something more than apprehension, however imminent, of a mere battery, not amounting to a felony. In order to justify the assault, and to slay an assailant, within the meaning of this section, there must be an apparent design on the part of such assailant to either take the life of the person assailed, or the infliction of some great personal injury, amounting to a felony, if carried out; and, in addition thereto, there must be imminent danger of such design being accomplished."

In *Acers v. United States*, 164 U. S. 388 (41 L. Ed. 481, 17 Sup. Ct. Rep. 91, see, also, Rose's U. S. Notes), the court below had charged:

That in order to justify a killing in self-defense, the sudden injury must have been

“a great injury to the person injured that would maim him, or that would be permanent in its character, or that might produce death. * * That there was danger to his life or of deadly violence to his person, and unless that condition existed then there is no ground upon which this proposition can stand.”

The court held that there was no error.

Careful research by the members of this court, assisted by the briefs of learned counsel for the defendant, has discovered four cases which are claimed to be to the contrary, namely: *State v. Keasling*, 74 Iowa, 528 (38 N. W. 397), *State v. Clark*, 134 N. C. 698 (47 S. E. 36), *Rogers v. State*, 60 Ark. 76 (29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465), and *State v. Sloan*, 22 Mont. 293 (56 Pac. 364).

The Iowa case cited does not seem to me to be at all in point. In that case the court had charged the jury that the sudden danger must be *actual* rather than *apparent*, and it was upon that ground that the court reversed the judgment of the court below, and not upon the ground that the instruction required the assault to be felonious in its character, in order to justify the killing. The law in Iowa is well established that the assault, in order to justify killing in self-defense, must have been felonious: *State v. Thompson*, 9 Iowa, 188, and *State v. Kennedy*, 20 Iowa, 569.

It will appear from the consideration of the above decisions that the overwhelming weight of authority is to the effect that, independent of statutory provi-

sions, an assault must be felonious in its character in order to justify a killing in self-defense. But we are not compelled to depend on the weight of authority at common law, for it seems that our statute and our decisions definitely and certainly settle the matter beyond controversy.

Section 1909 of the present Code was originally enacted as part of the Code adopted in 1864 and was Section 518 of that Code. It provides:

“The killing of a human being is also justifiable when committed by any person as follows: (1) To prevent the commission of a felony upon such person or upon his or her husband, wife, parent, child, master, mistress or servant.”

This is the only section of the Code which gives any definition of justifiable homicide, which could possibly cover a case like the present one. Section 1910 of the Code provides for “excusable homicide.” But no part of its definition has anything to do with a homicide in self-defense. Section 1902, L. O. L., being Section 511 of the Code of 1864, provides that—

“Every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable, *as provided in this chapter*, shall be deemed manslaughter.”

It is clear, then, that the legislature intended to permit the justification of a killing in self-defense, only in cases where it was necessary to prevent *the commission of an apparent felony*.

Section 1914 of the Code, which was Section 523 of the Code of 1864, and which was adopted at the same time as the sections already referred to, provides:

“If any person shall purposely and maliciously, or in the commission or attempt to commit a felony, cut or tear out or disable the tongue, put out or destroy the eye, cut or slit or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable the limb or member of another, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than one nor more than twenty years.”

It seems to me very clear that this section was intended to cover every case of *great bodily harm*, which would justify a killing in self-defense at the common law, and to make every such willful injury a felony.

Section 1371 of the Code, which was adopted by the same legislature at the same time and as a part of the same act, as these other sections, and which was Section 3 of the act of 1864, provides:

“A felony is a crime which is punishable with death, or *by imprisonment in the penitentiary* of this state.”

It seems to me it is very clear that when these sections are construed together, any of the acts which would have been great bodily harm, under the definitions of the common law, are made mayhem and a felony under these statutes, and that, therefore, any of these things, and no others (except danger of death) would justify a killing in self-defense under our Code.

Section 1909 of our Code has been so construed by this court in at least four different cases, which must all be overturned in order to hold that any other assault, except a felonious one, would justify the taking of human life.

The charge complained of in this case was taken almost bodily from *State v. Hawkins*, 18 Or. 476, 487 (23 Pac. 475, 479), in which the court quotes the

language complained of with approval, from *State v. Neeley*, 20 Iowa, 108.

"The law regards human life as the most sacred of all interests committed to its protection, and there can be no successful setting up of self-defense unless the necessity of taking life is actual, present, urgent; unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from dreadful harm or severe calamity *felonious in its character*."

In *State v. Olds*, 19 Or. 397, 431 (24 Pac. 394, 403), Chief Justice THAYER, delivering the opinion of the court, said:

"The right, either of the state or an individual, to take human life, must be sanctioned by law. In the latter case it must appear that it was done to *prevent the commission of a felony* upon the individual, etc., as provided in Section 1730 of the Code."

In *State v. Smith*, 43 Or. 109, 117 (71 Pac. 973, 976), Mr. Chief Justice MOORE, delivering the opinion of the court, said:

"Before one can excuse his conduct in taking the life of another it must appear that it was done to prevent the apparent commission of a felony by the latter upon him."

In *State v. Doherty*, 52 Or. 591, 596 (98 Pac. 152, 154), Chief Justice Robert S. BEAN, delivering the opinion of the court, said:

"Fear of a slight injury is not sufficient, nor will a mere assault, not felonious, furnish an excuse for the taking of life. If the intention of the assailant is only to commit a trespass or simple beating, it will not justify his killing. * * But, considering the relative age and strength of the parties or the ferocity of the attack, if the intended beating is of such a character as to endanger life or limb, *then it will be felonious*, and the assaulted person is justified in

taking the life of the assailant if necessary to preserve his own or protect him from such a beating.”

The decisions of this court should, it seems to me, be like a steady light set in a high place to chart and direct the course which the lower courts can safely follow.

That the Circuit Courts have generally followed these decisions, strikingly appears, from the fact that practically the same instruction is now before us from the courts of two different jurisdictions in sections of the state remote from each other.

It is urged that there are cases, as in the instance of an assault by an insane person, or two persons out upon a plank in midocean, which will not hold them both, when a person would be justified in taking life to preserve his own, even although there was no felony intended or apparently intended. It seems enough to say that no such case is presented here, and there is no contention that any such facts existed. It will be soon enough to decide upon such remote contingencies, when some such case actually occurs. In view of the recklessness of some people in the matter of human life, it may be doubtful whether it would be good policy for the legislature to say in advance, that the killing of another human being should go entirely unpunished even under such circumstances.

An indeterminate penalty with a minimum of only one year's imprisonment for manslaughter is within the discretion of the trial judge, who hears all the evidence and knows all the facts, and who may be trusted to do as near as he can, what is justice in the cause. In addition to this, the law has provided the pardoning power in the Governor in extreme cases, where even the penalty of one year's im-

prisonment for the taking of human life might be harsh and unjust. But whether or not there may be cases in which the court would be justified in stretching the law, or legislating an exception which does not exist, it is plain there was no such case here.

Notwithstanding its statutory correctness and the eminent authority for the same, we do not think the use of the word "felonious" is to be recommended in instructions of this kind. It is more or less technical in its meaning and may possibly be misunderstood and be confusing to the jury. Here, however, there was no request for further explanation or definition of the word, and indeed the defendant in his own requests for instructions used the same term in a similar connection. In the thirteenth instruction the defendant asked the court to tell the jury:

"Any serious bodily harm apprehended from a *felonious attack* did not merely excuse but would justify extreme necessity."

And again in the fourteenth request the court was asked by the defendant to say to the jury:

"If then you should find in the consideration of this case that the defendant honestly believed that he was being *feloniously assaulted*, or had reasonable cause to believe or did believe he was in danger of death or great bodily harm, he would be justified in defending himself even to the extent of taking the life of his adversary."

The assault upon the defendant in this case, if there was one at all, was with a loaded pistol and was of course deadly in its character. It was for the jury to decide whether or not the deceased made the first assault, as claimed by the defendant, and whether or not defendant afterward fired the fatal shot when it was unnecessary to protect himself.

The question as to this instruction is really purely academic in this particular case.

When there has been generally a fair trial it seems to me we should not be too ready to reverse a case on account of trifling matters. The lower courts have much to contend with and if we review their actions captiously and hypercritically, their judgments in any trials will seldom stand. The aim of the criminal law is not so much to punish the particular offenders, as it is to furnish a just example which will prevent others from committing crime. This is especially true in the matter of murder and felonious homicide. In such cases it is as essential that prompt justice should be done as that justice should be done at all. Every reversal, after there has been a fair trial, tends to dull the edge of justice and discourage its officers in the attempt to enforce the law. At the same time it encourages reckless and evil-disposed persons to a disregard of the sacredness of human life, and to believe that they can carve and shoot each other, upon small provocation, and safely trust to the postponement and evasion of any penalty. No innocent man should be permitted to suffer or be judged without a fair trial; but, on the other hand, no guilty one should be permitted to escape or postpone the penalty of his misdeeds upon any trifling cause.

17. Complaint is made of the conduct of the district attorney and it is claimed that, in his argument to the jury, he used the following language:

“You can’t get away from the fact that Bill Butler shot that boy in cold blood. The fact that he was down in the other end with a Winchester—a fact asserted by Dutton and Jackson.”

Dutton and Jackson testified, as we have already seen, that they found a man at the west fence, and

that he was behind the fence with a gun, which he pointed at each of them in turn, and they described as nearly as they could observe in the dim light, the clothes he wore and the gun which was pointed at them over the fence; and the clothes and gun which were concededly worn and used by the defendant on that night had been described to the jury for comparison. Dutton and Jackson, however, did not directly identify the defendant as the man they saw behind the fence, and it is therefore claimed the statement of the district attorney, that the defendant was down at the other end with a Winchester "a fact asserted by Dutton and Jackson" was a misstatement and that the court below erred in not sustaining defendant's objections and motion in relation thereto. It seems doubtful if this question is presented in such a way as to enable us to pass upon it here. The bill of exceptions signed by the judge shows no such occurrence and the original transcript, certified to by the official stenographer, is as follows:

"Mr. Roberts made the statement that Bill Butler was at the west end of the field.

"By Mr. Boggs: Defendant objects on the ground that it is incompetent, irrelevant and immaterial and not evidence."

"By the Court: 'Gentlemen of the Jury, you are the exclusive judges of the evidence, and you will remember what the evidence was in that respect, and will consider what evidence was given and what wasn't.'"

Certain affidavits were filed on behalf of the defendant, asserting that the district attorney did make the statement complained of by defendant, and alleging that the attorney for defendant did make objection to the language and to the proceedings

thereon; and it is claimed that these affidavits are sufficient to present the matter to this court under Section 170 of the Code. The affidavits presented are those of the attorney for the defendant, Grace Taylor, a stenographer, and one Olga Beiberstadt. The stenographer was not the official court reporter appointed by the court, but a stenographer employed by the defendant. There is no evidence that she was a "competent" stenographer, and indeed the report of the argument of the district attorney is so fragmentary, that it seems plain she did not get anything like a complete report of the same. The certificate of the clerk is the only evidence that any of these affiants were disinterested. He certified that the stenographer was a respectable and disinterested party, "unless the fact of her being employed by the defendant's counsel would make her an interested party." It does not appear whether she was in the general employ of the defendant's attorney or only employed in that particular matter. The certificate of the clerk as to Olga Beiberstadt is as follows:

"I believe the affiant to be a respectable party, but *I do not wish to certify that affiant is disinterested* for the reason that she and the other members of the family have followed the case quite closely and they were called as witnesses."

It appears from the record that three of the Beiberstadt family were witnesses for the defendant in the cause. They were the nearest neighbors of the defendant, and evidently on very friendly terms. It was to the Beiberstadt home that the defendant went after the shooting, and where he remained until the arrival of the sheriff. It is apparent from the record that there was ample reason for the clerk to

hesitate in certifying that Olga Beiberstadt was a disinterested party. It may also be considered as doubtful whether the stenographer who was in the employ of the defendant in this particular matter was disinterested within the meaning of the law. Again, Section 170, L. O. L., also provides:

“Such statement must be filed within ten days of the time that the objection is made, if the court at the time the objection is made refuses the exception; and if the disagreement does not arise until the time of the settling of the bill of exceptions, then the said statement may be made and filed within ten days of that time and not otherwise.”

There is no showing as to when the controversy arose (if there was a controversy) between the court and the attorneys for the defendant as to what took place, and no showing as to whether or not the affidavits were filed within ten days after the controversy arose. It appears from the record that the cause was tried in February, 1918. The bill of exceptions, however, was not settled until August 10th of the same year. The affidavit of the defendant's attorney, and that of Grace Taylor, the stenographer, was sworn to on the ninth day of August, so that the controversy must have arisen, at some time prior to the settling of the bill of exceptions, but as to whether it occurred at the trial, or at some time between the trial and the settling of the bill of exceptions, does not appear. The affidavit of Olga Beiberstadt was not filed until August 17th. It seems impossible to say from the record whether the affidavits were filed within the time required by the statute or not. If they were not, of course they cannot be considered by this court.

If we should conclude that the record was in such shape as to present the question to the court at all,

we should then have to pass upon the question of fact, as to whether or not the affidavit of these more or less interested parties—the attorney for the defendant—the stenographer for the defendant, and Olga Beiberstadt, a possible partisan of the defendant—overcome the showing made by the bill of exceptions, made and certified to by the judge who tried the cause and the official transcript of the official stenographer, certifying as to what took place at the time of the alleged occurrence. Even if the affidavits prevailed over the certificate of the judge and of the official stenographer as to the facts, there would still be a question as to whether upon defendant's own showing any exception as to the alleged misstatement of the district attorney was properly and tangibly presented to the trial court. Section 170, L. O. L., provides:

“The point of the exception shall be particularly stated.”

The statement of the district attorney now complained of is, that the alleged fact that the defendant was at the west side of the fence was “asserted by Dutton and Jackson.” According to the affidavit the objection of the defendant's attorney in the court below was as follows:

“If your honor please, defendant objects to the argument of the district attorney. Neither Dutton or Jackson testified that defendant was at the west side of his field that night. The fact that defendant did not testify while on the witness stand that he was not at the west side of his field that night is not an admission that he was there. *There was no evidence that defendant pulled a gun on Dutton or Jackson.* I object to all the argument of the district attorney, and ask the court to instruct the jury to disregard same, and that defendant did not admit

that he was at the west side of the field that night, and *that there was no evidence that defendant pulled a gun on Dutton or Jackson*, and that neither Dutton or Jackson testified that defendant was at the west side of his fence that night.”

There is so much in the objection and motion, even according to the claim of defendant, and the matters complained of are so blended and confused, that it would have been very difficult, if not impossible, for the court below to have disentangled the good from the bad. It is perfectly apparent that the objection and motion could not have been sustained as a whole. The exception, if there was any, was to the ruling of the court upon the motion as a whole, and otherwise no particular point was presented, as required by the statute. But assuming (but not deciding) that the affidavits were filed in time—that they were sufficient to present the question to the court and that these affidavits prevail over the certificate of the trial judge and the official stenographer; and assuming, further, that the defendant had complied with the law in pointing out the particular point of his objection; we are still of the opinion that there was no such error as would justify a reversal of the cause. It seems to us that the assumption by the district attorney that the witnesses Dutton and Jackson had identified the defendant was more in the nature of a misconstruction of the testimony than a positive and willful misstatement.

The witnesses, Dutton and Jackson, had stated that they saw someone at the west side of the field, and that that person had pointed a gun at them over the fence, as stated by the district attorney, and they had described that person, his clothes, and his gun as nearly as they could on account of the semi-darkness and excitement. From the description of

the clothes and the gun and the circumstances and the fact that the defendant admitted he was up there at the field with a gun that night, the district attorney jumped to the conclusion that the person Jackson and Dutton saw at the west side was the defendant, and generalized the whole matter by stating that they saw the defendant up there. It would be going much too far, it seems, to hold that such a too-strong construction of the testimony, by an attorney in the heat of argument, is sufficient cause for the reversal of a case.

The court below submitted the whole matter to the jury who were really the final arbiters, as to what the testimony really was. The judge, in effect, told them to disregard the statements of the district attorney if they were not sustained by the evidence. No court can be expected to hold every detail of the testimony in a long case in his mind, so that he can say upon the spur of the moment exactly what the testimony was. And he ought not to be required upon a general objection like this, covering a number of different points, to stop the proceedings of the trial and go through a long record from start to finish to ascertain just what was the exact testimony as to each of the different matters covered by the motion. It goes without saying that every attorney should keep within the evidence and if he willfully makes a misstatement as to the testimony upon an important matter, it may be sufficient cause for a reversal. We do not think such a result would be justified from the circumstances in this case.

There are some other minor claims of error, to which we have not specifically referred, but all of which we have carefully considered, and we think the rulings of the court thereon were not erroneous.

Upon the whole the defendant seems to have had a fair trial and the court below seems to have striven to preserve and secure for him all of his rights. Many of the rulings of the court were more favorable to the defendant perhaps than the law would justify.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

HARRIS, J., Concurring Specially.—I concur in the conclusion of Mr. Justice BENNETT that the defendant was not prejudiced by the instruction referred to in the seventeenth assignment of error. The question as to whether or not the right of self-defense is available only when necessary to avert a felony, actual or apparent, is, on the record presented here, purely academic; and the decision of that question is entirely unnecessary for the disposition of this appeal. Assuming that McDonald Stewart fired at the defendant, then it is certain that he did so either in self-defense or else his conduct amounted to an actual or apparent felonious assault upon the defendant; and therefore the instruction was not prejudicial to the rights of the defendant even though it is assumed that a person can slay an assailant in order to prevent bodily harm not amounting to a felony: *Mitchell v. State*, 38 Tex. Cr. Rep. 170, 192 (41 S. W. 816); *Curtis v. State* (Tex. Cr. App.), 59 S. W. 263; *Bryant v. State* (Tex. Cr. App.), 47 S. W. 373; *Matthews v. State*, 42 Tex. Cr. Rep. 31 (58 S. W. 86); *Evans v. State*, 120 Ala. 269, 274 (25 South. 175).

I express no opinion as to whether or not the right of self-defense exists only in order to prevent felonies regardless of the degree and extent of the bodily harm actually or apparently about to be done to the

slayer; and I withhold any expression of opinion upon that subject until a case is presented requiring a decision of the question.

While the language used by the court when addressing the jury about reaching an agreement might in some cases be harmful and for that reason ought not to be followed as a model, yet, for the reasons pointed out by Mr. Justice BENNETT I am entirely satisfied that the defendant was not prejudiced at all. It is always dangerous, in the view of the writer, for the trial judge to attempt to urge upon the jury the importance of an agreement. No person realizes any more than does a juror that it is important that the jurors agree. Whenever the trial judge does enter into the subject at all there is always an accompanying risk, unless great care is used, of saying something which might be harmful to one of the parties.

I concur with Mr. Justice BENNETT in both the reasoning employed by him and the conclusions reached by him concerning the remaining assignments of error. The judgment should be affirmed.

JOHNS, J., concurs.

BURNETT, J., Dissenting.—The defendant was indicted for murder in the second degree, committed by killing Joseph McDonald Stewart. The homicide involved seemed to have resulted from a dispute about laying out a county road through the land of the defendant. The highway in question ran through the defendant's premises from west to east. The claim of the prosecution is that someone had been laying up a rail fence across the supposed road on the east and west boundaries of the defendant's land. It is in evidence that the road

supervisor had thrown down the fence several times; that each time it was put up, again, and that on the evening in question, October 29, 1917, the friends of the road, including the supervisor, had arranged to watch the gaps in the fence on each side of the defendant's land in order to identify the party who closed them. Two men, Dutton and Jackson, accompanied by the wife of the latter, went in an automobile to a point about 400 steps from the west gap, where the men left the car and went toward the opening in the fence where the road went through. As they approached, they saw someone laying up the rails. They then returned to the car and drove it up to a point near the gap, where the two men got out and advanced through the gap and along the fence inside the defendant's inclosure, away from the disputed road, when they saw a dark object farther down the fence. As they approached, it proved to be a man, who pointed a gun first at Dutton and then at Jackson. They both retreated and left in the automobile. Neither of them was able to identify the man they saw.

Soon after this the decedent was killed at a point about 119 feet outside of the defendant's premises on the east side, measured from the opening in the fence at that point. The evidence tends to show that the decedent was concealed behind a tree. Pursuant to the arrangement he had gone there to watch the gap in the fence. It was expected that a man named Patrick would accompany him, but for some reason Patrick could not be present and the decedent was there alone. He was armed with a pistol. There were powder-marks on the tree, as if a shot had been fired from behind it toward the fence. A pistol bullet was found in one of the fence rails south of the gap, as if fired from the direction of

the tree behind which the decedent was concealed. Substantially, the defendant's version of the affray was that he was walking along the east line inside his premises from the north to the south and had got a little south of the line of the road when someone fired two shots toward him from the direction of this tree. He then raised his gun quickly and fired two shots, and moved a few feet farther south along the fence, when a third shot came from the direction of the tree and struck the rail near him. He says that he took a few steps farther south, got down behind the fence, pointed his gun through the fence and fired a shot at a dark object alongside of the tree, when the decedent fell and "hollered," and the defendant got up and left the scene.

The jury retired about 4 o'clock in the afternoon and at 11:25 that night it returned for further instructions on self-defense and some of the testimony was read to it at its request by the official reporter. Among the instructions given to the jury before it retired, and repeated when it returned, was the following:

"The law regards human life as the most sacred of all interests committed to its protection, and there can be no setting up of self-defense, unless the necessity of taking human life is actual, present, urgent, unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from deadly harm or severe calamity felonious in its character, or from all of the circumstances he had reasonable ground to believe his life or person was in such grave danger."

This instruction was erroneous, among other things in that it required the danger to be one of deadly or fatal harm or felonious in its character. A man's life may be endangered by an act not felo-

nious in its nature. It is not essential that his assailant be or appear to be in the act of committing a felony upon him. If the conduct of his assailant either actually or apparently puts the defendant in imminent danger of death or great bodily harm, it is no concern of his with what intent the assailant is acting. For instance, an insane person is incapable of committing a felony, being unable to form a felonious intent; yet one attacked by such a demented person would have the right in the presence of real or apparent danger of death or great bodily harm at his hands, to kill the assailant in self-defense if necessary to repel the attack. In case of common calamity where there is a question of which of two persons shall survive, it is not felony for either to preserve his own life by sacrificing that of the other, as, for instance, in shipwreck where the only plank will support but one person and two struggle for it, either has the right to defend his own life by killing the other, although there is no felony present in the transaction. One would have a right to defend himself even against a child armed with a pistol and about to shoot him.

In *State v. Keasling*, 74 Iowa, 528 (38 N. W. 397), substantially the same instruction was given that is here under consideration, and the court said that it was erroneous, specifying that:

“Under it the right to take life or to resort to the use of a deadly weapon in the resistance of an assault is made to depend on whether the assault is in fact felonious, and the danger actual and urgent.”

In *State v. Clark*, 134 N. C. 698 (47 S. E. 36), practically the same question was before the court. The decedent had attacked one Miller with a knife. The defendant interposed, when the decedent turned

upon him. The court thus instructed the jury, modifying the request of the defendant as noted in brackets below:

“If the jury believe from the evidence that the deceased was engaged in a difficulty with Asa Miller and was attempting to cut said Miller with his knife in the presence of the defendant [and the deceased was then capable of executing such a purpose], it was his duty to endeavor to suppress and prevent the same, and if in attempting to do so the deceased left off his difficulty with Miller and made upon the defendant with a drawn knife in such manner as to cause the defendant to [reasonably] apprehend, and he did [actually] apprehend, that he was about to be slain, or to receive enormous bodily harm, then the defendant had a right to stand his ground and, if necessary, to take the life of the deceased without retreating [provided the assault made upon the defendant was felonious or with felonious intent].”

After various other adverse comments upon the proviso in the last clause, the court said:

“But the addition to the defendant’s prayer for instructions was in itself erroneous. It was not necessary that the assault upon the defendant should have been felonious or committed with a felonious intent.”

In *McKinney v. Commonwealth*, 26 Ky. Law Rep. 565 (82 S. W. 263), the trial judge had instructed the jury that, “One may lawfully defend his home from the willful assault of another.” The plain effect of the word “willful” in this excerpt was to bind the defendant by the intent with which the decedent acted, and not to allow the defendant to rely upon the decedent’s act without reference to his intent. In other words, when worked out to its logical analysis, the teaching of the instruction was that before a defendant may slay his antagonist, the lat-

ter must not only have done or be about to do a wrongful act to the defendant capable of producing his death or great bodily harm, but must also disclose a criminal intent coupled with the act so as to make it amount to a felony. Here follows the commentary of the Kentucky Court of Appeals, speaking by Mr. Justice O'REAR:

"It was not incumbent upon one so assaulted to ascertain whether the assault was willful or not before he could lawfully exercise his right of self-defense or of protecting his family. The fact that the assault was violent, or reasonably appeared to put him or some member of his family in danger of losing his life or of great bodily harm, raised his right to defend himself or those of his home from the real or apparent danger. The word 'willful' should have been omitted from the clause quoted."

State v. Robinson, 143 La. 543 (78 South. 933), was a homicide case in which the jury was instructed thus:

"Before such a person as I have described can reasonably and honestly entertain this apprehension of danger to his life, or great bodily harm, there must be what the law calls an 'overt act, amounting to a felonious assault,' on the part of the person killed, directed against the body of the person doing the killing."

Ruling on this instruction adversely, the Supreme Court of Louisiana adopted as its own the argument of the defendant's counsel as follows:

"Under the decisions it was not necessary for the overt act to amount to a felonious assault. For there to be a felonious assault, the person perpetrating it must have intended a felony, while it is the law that he may have intended no harm at all. It is not what the person assaulting, or apparently assaulting, intends that controls, but what the act he does, taken in consideration with facts which had preceded, caused the defendant to believe deceased

intended, and which gave him the right to so believe, that controls. It might well be that deceased committed no assault at all, and that he did not intend to commit any, and yet such facts could exist as would give the defendant the right to have taken his life.

“In the case of *State v. Rideau*, 116 La. 247 (40 South. 691), an uncle had threatened the life of his nephew the day before. The next morning he entered the bedroom of his nephew, who, without a word, shot him as he entered. Defendant offered to prove the desperate character of his uncle and previous threats, but these were excluded on the ground that there was no overt act. This court said entering another man’s sleeping-room may be a friendly or a deadly act according to circumstances.

“Referring to his entering the room the court said, ‘We think it was a hostile demonstration.’ Deceased had a trunk in the room, and it could have been that he was entering to get something out of the trunk. But the intention of the deceased is not the test. The test is what the defendant believed, and what the act of deceased gave him to believe.”

The following cases are instructive in consideration of the principle that the real or apparent danger which a defendant may resist even unto the death of his antagonist, if reasonably necessary, or apparently so, need not in all cases amount to a felony: *State v. Sloan*, 22 Mont. 293 (56 Pac. 364); *Ritchey v. People*, 23 Colo. 314 (47 Pac. 272, 384); *Rogers v. State*, 60 Ark. 76 (29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465); *State v. Bowling*, 3 Tenn. Cas. 110; *State v. Bartlett*, 170 Mo. 658 (71 S. W. 148, 59 L. R. A. 756); *State v. Gray*, 43 Or. 446 (74 Pac. 927); *Hill v. State*, 94 Miss. 391 (49 South. 145).

The jury might well have believed from the instruction under consideration in the instant case that

before acquitting the defendant it was necessary to impute to the decedent the actual or apparent purpose to commit a felony, as distinguished from a mere misdemeanor, whereas the defendant is not to be bound by the intent of the deceased necessary to constitute a felony. He is entitled to defend himself against real or apparent danger of death or great bodily harm, whether it amounts to felony or not, and irrespective of whether or not his assailant has a felonious intent. The instruction was intrinsically erroneous in these respects.

Neither can the question properly or justly be ignored as academic. We have no right to assume as a fact the restrictive alternative that the decedent either fired in self-defense or as an assault upon the defendant, being armed with a dangerous weapon. It is possible that his design was only to frighten the defendant, which would not be felonious. At any rate, the jury could put that construction on his wild shooting and the defendant is entitled to it as constituting reasonable ground for believing himself in danger of death or great bodily harm within the illustration given in the Selfridge case: 1 Horrigan & Thompson's Cases of Self-defense, 1.

After having repeated the charge in question, taken from the original instructions, the court then addressed the jurors as follows, before they were permitted to retire the second time:

"Now, gentlemen, I have read to you the instructions on self-defense as I gave them to you at the time I instructed you before and I think I have covered all of the instructions upon self-defense.

"Now, when you go back I want you to do the best you can to harmonize your differences, and everybody remember that it must be a very severe strain upon a defendant to go through an ordeal of this kind, and he is entitled to a verdict, whatever it

shall be, and it is also important that the state shall have a verdict as we will have to try the case over again if we do not get a verdict, and I want you to try it over again, and I want you to try not to lose your tempers and try your best to harmonize your differences and everybody try to do right and to do what your consciences think should be done but do not get stubborn and say you won't. Sometimes jurors get tired and I know it is hard to ask jurors to do this work, but some jury will have to solve this and so I will ask you to do the best that you can to solve it. You may now retire with the bailiffs."

The counsel for the defendant then and there excepted to the language of the court. The jury very soon afterward returned a verdict of guilty of manslaughter and recommended "leniency of the court."

In the case of *State v. Ivanhoe*, 35 Or. 150 (57 Pac. 317), the jury, having been in consultation all night, was sent for and reported that it could not agree upon a verdict. The court sent it out again after addressing it as follows:

"The court will call the attention of the jury to the fact that this is a case of some importance. There has been a great deal of time taken up, and the case will have to be decided by some jury selected the same way you have been selected, and hear the same evidence, practically, you have heard. And, if another should disagree, it would have to be tried again, until a jury agreed, and it is not reasonable to suppose that another jury could arrive at a verdict in the case any better than you can. It is your duty to agree, if you conscientiously can do so. You should pay proper respect to the opinions of each other, and listen with a disposition to be convinced by each other's arguments. In this manner you may be able to determine whether any opinion you now hold is justified by the evidence. A proper

regard to the judgment of other men will often greatly aid us in forming our own judgments. In many of the relations of life, it becomes a duty to conform to the opinions of others, when it can be done without a sacrifice of conscientious convictions. More especially is this a duty when we are called to act with others, and when dissent on our part may defeat and materially affect the rights of third parties. The single object to be effected is to arrive at a true verdict, and this can only be done by deliberation, mutual concessions, and a due deference to the opinions of each other. By such means, and such means only, in a body where unanimity is required, can safe and just results be attained; and, without that, the trial by jury, instead of being an assistance or essential aid in the administration of justice, would become a most effectual obstacle to it. Jurors should carefully and patiently canvass all the evidence with an honest and conscientious effort to reconcile any differences of opinion they may entertain of the truth of the matter in issue. Of course, at last, each juror must act on his own judgment—the verdict must eventually be his own verdict; and I would not by these instructions at all urge any juror to violate his conscience, or to agree to a verdict other than he eventually believes to be the result of the evidence, beyond a reasonable doubt. I speak of these matters to you on account of the importance of the jury arriving at a verdict in this case. And, as I have already suggested in this case, I would not instruct any juror to violate his conscience in reaching a verdict; but, in determining whether his convictions are sustained or based exclusively on the evidence, he has a right to consider the opinions of other jurors, and listen to their construction of the evidence, as well as his own, and, if he can then conscientiously acquiesce in a verdict with the other jurors, it is his duty to do so, without violating any conscientious scruples or beliefs he may have in regard to the guilt or innocence of the party accused of the offense.”

The only distinction to be drawn between the language of the two trial judges is that in the instant case the instruction is more condensed. Otherwise the one here under consideration is substantially a miniature replica of the former. In both cases the palpable object of the court was to induce, if not compel, a verdict. The reasoning of Mr. Justice MOORE in the *Ivanhoe* case leads clearly to the conclusion that such language is reversible error. If it was wrong in the *Ivanhoe* case, constituting the only error considered by the court, it was wrong in the present instance. If it was right to reverse the *Ivanhoe* conviction on that ground, by the doctrine of *stare decisis*, if for no other reason, the present conviction should be overthrown. The majority of the court in the recent case of *Olcott v. Hoff*, 92 Or. 462 (181 Pac. 466), laid great stress on the duty of the court to be bound by precedent. If we are to regard this latest deliverance of the court as the law, it should be applied in the instance of the present defendant, leading to a reversal of the conviction.

In *State v. Bybee*, 17 Kan. 462, the jury had deliberated upon its verdict several hours when it was brought into court and asked if it had agreed upon a verdict. Having answered in the negative, the court harangued it in much the same strain that runs through the present remarks to the jury and those in the *Ivanhoe* case. The opinion of the court on appeal was delivered by Mr. Justice BREWER, afterward a member of the Supreme Court of the United States. The trial court had urged the jurors to approach the case in a spirit of mutual concession and forbearance and for each to surrender some of his own ideas and opinions to what might seem to be an overwhelming sentiment against him, finally using this illustration:

"You should bring your minds together like the mixing of different ingredients by an apothecary, and ascertain what is the product."

In reversing the case, Mr. Justice BREWER used this language:

"A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the theory of jury trials, that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds, is the certainty of fact sought in the law. Especially is this true in criminal trials. Here should no thought of compromise be tolerated. Before the state can fairly demand the conviction and punishment of an alleged criminal, the twelve jurors should each be led from the testimony to a clear conviction of his guilt; and where six jurors believe a defendant guilty of murder, and six believe him innocent of any offense, it is an outrage for the twelve to bring in a compromise verdict of guilty of manslaughter. We fear that something of this kind occurred in this case, and that the charge above quoted was mainly instrumental in producing this result. At any rate, it seems to us clear that such would be the tendency of those instructions; and it is not apparent that it did not have that effect. For this error the judgment must be reversed, and the case remanded with instructions to grant a new trial."

In *State v. Fisher*, 23 Mont. 540 (59 Pac. 919), after an extended colloquy between the court and the jurors, respecting the rules governing the jurors in their consideration of the testimony, the court addressed them, calling their attention to the expense of the trial, and said:

"This is a case, gentlemen, that is an expensive case for the county to try, and it is not a case where

I think a jury ought to disagree in. They either ought to find this man guilty of murder in the first degree, or they ought to find him not guilty. Feeling as I do about the matter, I do not see any reason why a jury should disagree in the matter, and put the county to a large expense, although I don't care to force any man against his conscience to agree to a verdict which he does not believe in. Nevertheless, if he can be persuaded by talking with his fellow-jurors as to the guilt or innocence of this defendant, so that they all may agree, I should much prefer it."

The court reversed the case for this language used by the trial judge.

In *State v. Place*, 20 S. D. 489 (107 N. W. 829, 11 Ann. Cas. 1129), the utterance of the court to the jury was: .

"You will have to agree in this case, for I will keep you together until you do agree."

This, indeed, is stronger language than that being considered in the instant case, and led to a reversal. But the language of the court in its opinion applies even to this case:

"Within the limits allowed by the law the discharge of such duty [that of the jury] is as important and should be as free from coercion as are the duties imposed upon the judge. Neither court nor jury is responsible for the conduct of the other while acting in its own legitimate province."

In *People v. Engle*, 118 Mich. 287 (76 N. W. 502), under circumstances similar to those of the present litigation, the court advised the jurors to try to be persuaded instead of trying to persuade their fellows. Within an hour afterward, the jury returned a verdict of guilty, recommending leniency. The conduct of the court was held to be erroneous. See, also, *State v. Chambers*, 9 Idaho, 673 (75 Pac. 274),

where the court reminded the jurors of the great expense of the trial, admonished them to meet in a spirit of investigation, to try to get together and not have too much pride in their individual opinions, and the case was reversed because of such remarks, the court citing the *Ivanhoe* case from the Oregon Reports. Another precedent to the same effect is *State v. Shuman*, 106 S. C. 150 (90 S. E. 596).

In addition to its coercive effect upon the jury, the admonition was also erroneous in that, after twice urging the jurors to "harmonize your differences," the judge told them to "do what your consciences think should be done, but do not get stubborn and say you won't."

In *Rugenstein v. Ottenheimer*, 70 Or. 600 (140 Pac. 747), the language of the charge was in part as follows:

"Now, gentlemen, take the facts in this case—do what is right between the plaintiff and the defendant here, without regard to anything, except as your own conscience dictates it to you, under the evidence and under the rules of law as I have given them to you."

A judgment for the plaintiff was reversed because of this language, and the precedent has never been questioned since. There, the statement made reference to the law and the evidence as an accompaniment to the dictates of conscience. In the instant case the decision is placed exclusively upon "what your consciences think should be done." The only issue or "difference" to be considered in the deliberations of the jury was the guilt or innocence of the defendant. The jurors' own differences had no place in the matter. With many, if not most, men, conscience is but a euphemism for prejudice and is not the formula for the determination of an issue of fact

in judicial proceedings. The law of the land and the evidence constitute the standard by which the accused must be judged and his liberty ought not to be committed to the so-called conscience of his triers. Practically, the court told the jury to return a "general principles" verdict. The direction to harmonize individual differences can mean nothing else than an invitation to a compromise verdict, which Mr. Justice BREWER so properly denounced as an outrage.

Aside from precedent, and on principle, the language of the Circuit Court should lead to a reversal of the case. The statute lays down the limits of the court's duty thus:

"In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact": Section 139, L. O. L.

It is the exclusive province of the court to declare to the jury the law of the case. The latter's function of declaring the fact after considering the testimony is equally exclusive and the court has no right to say anything to it at any stage of the instructions, much less after its deliberations have begun, calculated to hasten or retard the discharge of its duty. When the judge does so he interferes with the prerogative of the jury in an unwarranted manner. He goes beyond his function of declaring the law and undertakes to influence the declaration of the fact. No principle of law is involved in such a lecture and jurors are not under the tutelage of the judge. Like him, they are for the time being component parts of the tribunal, charged with the execution of the law. Whether or not the jury stated to the court that it was unable to agree does

not affect the principle. What was said in either case had a tendency to force a decision. Coupling an erroneous instruction on self-defense with the address urging the jury to a verdict in the terms stated, followed as it was by what was evidently a compromise verdict, was prejudicial to the defendant.

Another assignment of error is predicated upon alleged misconduct of the district attorney in his argument to the jury. As stated, the court admitted the testimony of two witnesses, Dutton and Jackson, to the effect that the same evening but before the homicide in question, they were on watch near the western boundary of the defendant's land and saw a man laying up some rails across the alleged county road, who disappeared as they drove up in their automobile, and that when they left the car, went inside the Butler premises and proceeded south along the fence, a man rose up from the fence corner and leveled a gun upon them, whereupon they retreated. It will also be recalled that the homicide occurred near the east boundary of the defendant's premises. It is charged that in the argument to the jury the district attorney used this language:

"You can't get away from the fact that Bill Butler shot that boy in cold blood; the fact that he was down in the other end with a Winchester, a fact asserted by Dutton and Jackson."

The defendant claims that his counsel made the following objection at this point:

"If your honor please, defendant objects to the argument of the district attorney. Neither Dutton nor Jackson testified that defendant was at the west side of his field that night. The fact that defendant did not testify while on the witness-stand that he was not at the west side of his field that night is not an admission that he was there. There was no evidence that defendant pulled a gun on Dutton or

Jackson. I object to all the argument of the district attorney and ask the court to instruct the jury to disregard same and that defendant did not admit that he was at the west side of the field that night, and that there was no evidence that defendant pulled a gun on Dutton or Jackson and that neither Dutton nor Jackson testified that defendant was at the west side of his fence that night."

It is also claimed on the part of the defendant that in ruling upon the objection the court used this language:

"Well, it doesn't make any difference anyway, the jury are half asleep and if you don't find the defendant was down there at the west end of the fence that night, why you won't have to consider it"

—and that the defendant excepted to the ruling at the time. This matter is not in the bill of exceptions signed by the trial judge, but appended thereto is the affidavit of a stenographer who took down the address of the prosecuting attorney, to the effect that the district attorney used the language in question; that the defendant's counsel made the objection stated and that the court made the ruling mentioned, to which the defendant's counsel excepted. The affidavit of defendant's counsel is also appended, to the same effect, and these two are corroborated by the affidavit of a third deponent in substantially the same terms. As to the stenographer, the clerk of the court certifies that he believes her "to be a competent stenographer and a respectable and disinterested party, unless the fact of being employed by the defendant's attorney would render her an interested party." As to the third affiant, the clerk certifies:

"I believe the affiant to be a respectable party. But I do not wish to certify that affiant is disinterested, for the reason that she and the other mem-

bers of the family have followed the case quite closely and they were called as witnesses.”

There are no affidavits in the record in opposition to those already mentioned. Section 170, L. O. L., reads thus:

“The point of exception shall be particularly stated, and may be delivered, in writing, to the judge, or entered in his minutes, or taken down by an official stenographer, or by any competent stenographer, at the time it is made, and at the time or afterwards, be corrected until made conformable to the truth. If an objection is made to any ruling of the court in the progress of a trial, and the truth of the statement thereof is not agreed upon between the counsel and the court, the counsel may verify his statement thereof by his own oath and that of two respectable and disinterested persons, or by his own oath and that of the stenographer who took the same down, and file the same as an exception to the ruling objected to. Such statement must be filed within ten days of the time that the objection is made, if the court at the time the objection is made refuses the exception; and if the disagreement does not arise until the time of the settling of the bill of exceptions, then the said statement may be made and filed within ten days of that time, and not otherwise. Within ten days thereafter the adverse party may file a statement of objection as prepared or approved by the court, together with the affidavits of not more than three respectable and disinterested persons, or the affidavits of himself and the stenographer who took the same down, concerning the truth or falsity of the statement of the exception as filed by the counsel, and prepared or approved by the court. Each statement of the exception, and all affidavits concerning either of them when filed as herein required, shall be deemed a part of the record of the cause, and upon an appeal or review, the appellate court must first ascertain therefrom the truth of the matter as far as possible, and then determine the law arising thereon. The court must allow the coun-

sel a reasonable time to procure the verification of his statement as herein required; and all affidavits of said persons shall be taken by the clerk of the court, who must certify thereon, if he is satisfied of the fact that the person is respectable and disinterested."

Arguendo the majority opinion urges that a dispute is not apparent concerning the subject matter of the bill of exceptions so as to call for the sworn statement by counsel for the defense and other persons mentioned in the statute. Throughout the original bill before us are erasures of the phrase "exception taken and allowed," and the typewriting of the document is not uniform, indicating that pages were rewritten and inserted before it received the official signature of the trial judge. All this tends to show that the judge and defendant's counsel were not in accord about the frame of the bill at the time it was settled. The dispute must have arisen then on August 10, 1918, the date of the settlement of the bill. The affidavits were filed on the seventeenth of the same month, within the ten days allowed by statute. Nay, more; although the objectionable speech of the public prosecutor and the ruling of the court thereon are set out at large in the brief for the defendant they are not challenged in the brief of the prosecution. Under such circumstances it ill becomes this court to say in effect that the question is not before us. In that respect we ought not to assume to be wiser than counsel for the state.

The contention is made that there is no evidence that the stenographer is competent and allusion is made to what is styled the fragmentary report of the district attorney's address to the jury. It is barely possible that in the hurry and excitement of a closely contested murder case the diction of the

prosecutor may not have been perfectly clear and coherent. It may be, too, that an absolutely *verbatim* report of his language throughout his speech under such circumstances would not read so well as the orations of Webster, Everett or Calhoun, who spoke after careful preparation. It is not impossible that the fragmentary language in the early part of the address is due to the speaker rather than the reporter. The contention on that point may be dismissed by reference to the certificate of the clerk, which states that the stenographer in question is both competent and respectable.

In making up the document necessary to present his case on appeal the defendant is not irrevocably bound by the report of the official stenographer, the appointee of the judge whose rulings are drawn in question. The statute gives the defense the benefit of the report of any competent stenographer. It does not prescribe a standard of competency. We have then before us the affidavits mentioned, which the statute says "shall be deemed a part of the record." Under this mandate of the Code we cannot exclude them. It is true, the clerk while certifying that the stenographer is competent and that both she and Miss Beiberstadt, another affiant, are respectable, does not state unreservedly that they are disinterested. The statute does not make his certificate indispensable to the competency of such affidavits. His qualifying reservations only affect the weight to be given to those sworn statements. But, whether the two affiants besides defendant's counsel are disinterested or not, we have the alternative showing of counsel's affidavit and that of the stenographer who took down the language of the district attorney.

Trial judges are human beings, subject to pride of opinion and often to an ambition to make a good record of affirmances on appeals from their decisions. This statute is remedial in its nature, designed to give relief in cases where disputes about bills of exceptions arise between fallible judges and fallible counsel. In the instant case, without making any imputation against the trial judge whose standing as a man and a jurist is so excellent, it is enough to say that the question of the misconduct of the district attorney is in the record for our decision and no amount of special pleading or quibbling can rightly take it out. On the merits of this branch of the case we are confronted with three affidavits upon which, if false, perjury can be predicated. There is nothing whatever to oppose them. Neither the judge nor the district attorney, nor any respectable and disinterested person furnishes any sworn statement to the contrary. The Code says that from such affidavits we must determine the truth of the matter. The official bill of exceptions is neither all sufficient nor self-sustaining. It is laid aside in the settlement of the dispute about its accuracy. As the law declares, we must ascertain the truth from the affidavits. On the objectionable language of the district attorney, the objection of the defendant's counsel and the ruling of the court thereon, these sworn statements are clear and explicit. To refuse to give them effect is to shut our eyes against the undisputed record and it would belittle the intelligence of the trial judge to intimate that the objection of defendant's counsel is too complicated to present to the Circuit Court the question involved.

Since there is no contrary showing, that made by the defendant as to the exception must be taken as true. Attached to the bill of exceptions is a com-

plete report of all the testimony in the case. On direct examination the witness Dutton testified to the presence of a man near the gap in the fence at the west boundary of the defendant's land, but did not pretend to say who the man was, although he was within 15 feet of him and the moon was shining brightly. On cross-examination he testified thus:

"Q. Mr. Dutton, are you acquainted with the defendant?

"A. Yes, sir.

"Q. How long have you known him?

"A. Oh, I say four years anyhow, and maybe a little longer.

"Q. Did you see him frequently?

"A. Yes, sir.

"Q. How often about, would you see him?

"A. Oh, sometimes every day; he has worked for me on the road, him and his boys and all three of them.

"Q. Could you recognize his boys from their appearance?

"A. Yes. Yes, I know him.

"Q. Well, in fact, you are very well acquainted with him, aren't you?

"A. Yes, sir.

"Q. Well, who was it that you saw there that night at the fence?

"A. Oh, I don't—I could not say.

"Q. You don't know?

"A. No, sir, I don't know. I could not say."

The witness Jackson testified in similar strain about the presence of a man at the point mentioned. On direct examination he testified thus:

"Q. Do you know this defendant, W. E. Butler?

"A. I don't know as I ever met him."

And on cross-examination he gave the following testimony:

"Q. Where was this man you have been testifying about when you first saw him?

"A. I don't know what you mean.

"Q. Well, this man with a gun, isn't that what you have been testifying about?

"A. Yes.

"Q. Where was he?

"A. When I first saw him?

"Q. Yes.

"A. He was in the fence.

"Q. Who was?

"A. I don't know.

Judged by the official data in the record, the district attorney was in error in his statement to the jury that Dutton and Jackson asserted as a fact that the defendant was at the other end of the road with a Winchester, the truth being that they did not know who the man was.

"It is reversible error for the prosecuting attorney in his argument to the jury to assert facts and circumstances as being in the case which are not shown by the evidence, or to comment upon such facts, or to draw inferences from them unfavorable to the accused": 12 Cyc. 574.

In the note to *McDonald v. People*, 126 Ill. 150 (18 N. E. 817, 9 Am. St. Rep. 547, 559), it is said:

"It may be regarded as an established rule that it is error, sufficient to reverse a judgment, for counsel, against objection, to state facts pertinent to the issue, and not in evidence, or to assume in argument that such facts are in the case, when they are not: Hilliard on New Trials, 225; Proffatt on Jury Trial, § 250; *McAdory v. State*, 62 Ala. 154; *Cross v. State*, 68 Id. 476; *Wolffe v. Minnis*, 74 Id. 386; *Little Rock Ry. Co. v. Cavenesse*, 48 Ark. 106 (2 S. W. 505); *People v. Mitchell*, 62 Cal. 411; *Newton v. State*, 21 Fla. 53; *Berry v. State*, 10 Ga. 511; *Mitchum v. State*, 11 Id. 615; *Dickerson v. Burke*, 25 Id. 225; *Yoe v. People*, 49 Ill. 410; *Felix v. Scharnweber*, 119 Id. 445 (10 N. E. 16); *Chicago etc. R. R. Co. v. Brogonier*, 13 Ill. App. 467; *Chase v. City of Chicago*,

20 Id. 274; *Ferguson v. State*, 49 Ind. 33; *Kinnaman v. Kinnaman*, 71 Id. 417; *Combs v. State*, 75 Id. 215; *Brow v. State*, 103 Id. 133 (2 N. E. 296); *Rudolph v. Landwerlen*, 92 Id. 34; *School Town of Rochester v. Shaw*, 100 Id. 268; *Martin v. Orndorff*, 22 Iowa, 504; *Hall v. Wolff*, 61 Id. 559 (16 N. W. 710); *Henry v. Sioux City etc. Ry. Co.*, 70 Id. 233 (30 N. W. 630); *Huckell v. McCoy*, 38 Kan. 53 (15 Pac. 870); *Rolfe v. Rumford*, 66 Me. 564; *Taft v. Fiske*, 140 Mass. 250 (5 N. E. 621, 54 Am. Rep. 459); *Scripps v. Reilly*, 35 Mich. 371 (25 Am. Rep. 575); *Rickabus v. Gott*, 51 Mich. 227 (16 N. W. 384); *People v. Dane*, 59 Id. 550 (26 N. W. 781); *Martin v. State*, 63 Miss. 505 (56 Am. Rep. 813); *Gibson v. Zeibig*, 24 Mo. App. 65; *Cleveland Paper Co. v. Banks*, 15 Neb. 20 (16 N. W. 833, 48 Am. Rep. 334); *Bullis v. Drake*, 20 Neb. 167 (29 N. W. 292); *Tucker v. Henniker*, 41 N. H. 317; *Bullard v. Boston & Maine R. R. Co.*, 64 Id. 27 (5 Atl. 838, 10 Am. St. Rep. 367); *Baldwin v. Grand Trunk Ry. Co.*, Sup. Ct. N. H., July, 1888 (64 N. H. 596, 15 Atl. 411); *Perkins v. Burley*, Sup. Ct. N. H., July, 1888 (64 N. H. 524, 15 Atl. 21); *Fry v. Bennett*, 3 Bosw. (N. Y.) 200; *Reich v. Mayor etc. of New York*, 12 Daly (N. Y.), 72; *Jenkins v. North Carolina Ore Dressing Co.*, 65 N. C. 563; *Union C. L. I. Co. v. Cheever*, 36 Ohio St. 201 (38 Am. Rep. 573); *Willis v. McNeill*, 57 Tex. 465; *Galveston etc. R. R. Co. v. Cooper*, 70 Id. 67 (8 S. W. 68); *House v. State*, 9 Tex. App. 567; *Conn v. State*, 11 Id. 390; *Grosse v. State*, 11 Id. 364; *Laubach v. State*, 12 Id. 583; *Clark v. State*, 23 Id. 260 (5 S. W. 115); *Tillery v. State*, 24 Id. 251 (5 S. W. 842, 5 Am. St. Rep. 882); *Brown v. Swineford*, 44 Wis. 282 (28 Am. Rep. 582); *Bremmer v. Green Bay etc. R. R. Co.*, 61 Wis. 114 (20 N. W. 687); *Hardtke v. State*, 67 Id. 552 (30 N. W. 723); *Sasse v. State*, 68 Id. 530 (32 N. W. 849)."

In *State v. Hatcher*, 29 Or. 309, 315 (44 Pac. 584, 586), Mr. Justice MOORE, speaking for the court, said:

“The rule is universal that it is error to allow an attorney, in an argument, over his adversary’s objection, to go outside the evidence and comment on facts assumed to have been proved, and that an exception to the action of the court in permitting it will be reviewed’ on appeal: Elliott on Appellate Procedure, § 672; Proffatt on Jury Trial, § 250. In *Tenny v. Mulvaney*, 8 Or. 513, LORD, C. J., in discussing this question, says: ‘It is held to be the strict duty of the court to arrest an argument not based on evidence. And if objection be made to this course of argument, it is error for the court to permit it, and a new trial will be granted.’ ”

In *State v. Blodgett*, 50 Or. 329, 342 (92 Pac. 820, 825), the court used this language:

“When the party who is injured by the wrong calls for the intervention of the court by an objection, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury. The court is bound to interpose when so called upon, and, if an improper and injurious statement has been made without excuse, the effect of it should be erased from the minds of the jury, then and there, by an emphatic and explicit admonition from the court: *Nelson v. Welch*, 115 Ind. 270 (16 N. E. 634, 17 N. E. 569). It may be said with equal propriety that the district attorney, although charged with the duty of prosecuting the defendant, has an equal responsibility with the court in seeing that the defendant has a fair and impartial trial. The evidence offered should be legal and pertinent, fairly and impartially stated to the jury, and the deductions and arguments therefrom legitimate and candid. If in the prosecution it should happen, by inadvertent or hasty expression or otherwise, that improper and injurious statements are made to the jury, it is the duty of the offending party to make it appear by the record that nothing reasonably proper to be done was omitted in order to rectify the wrong and restore to the trial the fairness of which he presumably divested it.”

In *Tucker v. Henniker*, 41 N. H. 317, 325, the court used this language:

“When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested.”

In *State v. Gutekunst*, 24 Kan. 252, the court said:

“Where counsel refers to pertinent facts not before the jury, or appeals to prejudices foreign to the case, it is the duty of the court to stop him then and there. The court need not and ought not to wait to hear objection from opposing counsel. The dignity

of the court, the decorum of the trial, the interest of truth and justice forbid license of speech in arguments to jurors outside of the proper scope of professional discussion. We conclude with the words of Mr. Justice VALENTINE, speaking for the court, in *State v. Comstock*, 20 Kan. 655: 'Courts ought to confine counsel strictly within the facts of the case; and if counsel persistently go outside of the facts in their argument to the jury, then the court should punish them by fine and imprisonment; and if they should obtain a verdict by this means, then the court should set such verdict aside.' "

The following excerpt is taken from the language of the court in *People v. Aikin*, 66 Mich. 460 (33 N. W. 821, 829, 11 Am. St. Rep. 512, 527):

"There can be nothing gained in the end by an overzealous and unfair perversion of facts, in order to convict an accused person of a crime of which the prosecutor may have good reason to believe him guilty, and which, as in this case, may be hard to establish by the ordinary and established methods of procedure. While the zeal of the prosecutor may be well excused, and the hot and bitter language that comes from the heart, involuntarily, of one who is thoroughly impressed with the heinousness of the crime and the guilt of the respondent, is to be expected in such cases, it is nevertheless the duty of the court sitting impartially between the people and the prisoner to check and control any intemperance of zeal or language that is not warranted by the facts and circumstances shown by the proofs. If this is done, as it was not in this case, the final court of review, removed entirely from the passion and prejudice that generally surround the trial in the lower courts of cases of this nature, will see to it that the injustice is corrected, and a new trial granted.

"By this permission of unfair and unjust conduct on the part of the public prosecutor or his assistants, not only is the course of justice perverted, but added cost and delay are the natural consequences

of the attempt of the court of last resort to give to every citizen accused of crime the protection granted by the constitution,—a fair trial before an impartial jury.

“It must also be remembered, that however heinous the crime, and however difficult it may be to establish it by the usual and approved means of procedure, and no matter how firmly the public prosecutor and the community at large may be satisfied of the guilt of the accused, and even though in fact he may be guilty, the rules and methods of trial permitted to be relaxed or disregarded in his particular case, with perhaps the laudable object and desire that justice may be done, must, nevertheless, as a natural consequence of the ways of our jurisprudence, appear hereafter as so relaxed or disregarded as precedents to be used against all persons accused of crime, to vex the innocent as well as the guilty. There is therefore no safety and no justice in allowing the supposed merits of a particular case to override and set aside, even for a moment, the barriers that our constitution and laws have hedged about the citizen when arraigned and put upon trial for an alleged crime.”

Precedents sustaining the same doctrine could be cited almost without number.

Whether designedly, or inadvertently in the heat of argument, the prosecutor misrepresented the testimony, saying Dutton and Jackson asserted that the defendant was at the west side, when in fact they both said they did not know who the man was whom they saw there. If we may call black white, then only is the district attorney's statement in accord with the testimony. Against the explicit objection of the defendant's counsel the court refused relief and left the whole matter to the jury in palpable violation of the doctrine of *State v. Blodgett*, 50 Or. 329, 342 (92 Pac. 820, 825), and *State v. Hatcher*,

29 Or. 309, 315 (44 Pac. 584, 586), decided heretofore in this court.

All the testimony about the action of the unidentified man on the west side of the defendant's premises should have been kept out of the case because that transaction had no necessary connection with the admitted homicide. It is not within the doctrine of *State v. La Rose*, 54 Or. 555 (104 Pac. 299), cited in the majority opinion. There the murder was committed by the use of a piece of rusty gas-pipe wrapped in paper. As it was proved that this method of homicide was novel and unusual, the court received evidence of other practically identical assaults in the immediate vicinity of the place where was committed the one in question, in one of which the defendant was identified. On this ground alone this court justified the action of the Circuit Court, putting the case under the fourth division of the classification delineated by Mr. Justice MOORE in *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892).

In the instant case there is nothing novel or peculiar about pointing the gun that would tend to isolate the defendant from all other individuals who did the same act. It is believed to be the universal rule that those who slay others by the use of a firearm point the weapon toward the victim, and so there is nothing to put this case into the category of exceptions mentioned by Mr. Justice MOORE. But if we consider that the evidence was admissible, it was gross error for the district attorney even unintentionally to misstate the evidence, and it was still more erroneous for the court to make the ruling it did and in the language used. It was wrong for it to be left to the jury to decide whether the statement of the district attorney was relevant or not. The language

of the court gave sanction and credence to the unwarranted statement of the district attorney and of itself constitutes reversible error, as taught by the practically unanimous precedents from the earliest times.

Another assignment of error relates to testimony given in rebuttal by the witness Patrick on behalf of the state. Over the objection of the defendant, the witness was allowed to state that during the day immediately preceding the night of the shooting he had a conversation with the decedent about watching the road. The witness went on to testify as follows:

"He made the statement that he was going over and hide and watch until whoever was putting up the fence came up and then he would run out and see if he could identify them the same as you try to identify everyone on the street, to get close enough to do that was his idea, he thought maybe the party that was putting it up would run so quick he could not get to see him; he was going to run out so quick he could get there in time to see who the party was.

"Q. He was unable—state whether or not he was able to run very fast.

"A. He was lame in one foot, a little lame, and owing to that he doubted whether he could get out there.

"Q. Was there any further plan or procedure entered into at that time as to what he would do further in case anything would happen?

"A. I asked him what he would do if he did not run."

The defendant's counsel at that point objected to the conversation being detailed, but the court directed the witness to answer, allowing an exception to the defendant. The witness answered:

"I asked him what he would do if they would run. Well he says, 'They won't run because they won't

want to be identified.' Well I says, 'Supposing they commence to shoot.' Well, he says, 'I will shoot, too, then.' "

Throughout the case the prosecution brought to the fore the theory that all these individuals concerned in the opening of the road, including the decedent, were on the scene simply for the purpose of detecting who was laying up rails across the supposed road. No intimation is given in the testimony that the defendant knew anything of the purpose of the men who appeared on the west side of his premises and claim to have discovered an unknown man at the fence, who pointed his gun at them. Neither is there imputed to him any knowledge of the fact, if it was a fact, that the decedent was engaged in the same enterprise of watching the road on the east side. The prosecution thus seeks to bind the defendant by what at best may be said to have been the actual situation, whereas, under all the authorities, the defendant is entitled to rely upon the apparent danger of the situation as viewed by a reasonable man in his circumstances under all the surrounding facts as they appeared to him. It is enough for illustration to cite the case of *State v. Miller*, 43 Or. 325 (74 Pac. 658), and the Oregon precedents there noted. Conceding for the sake of the discussion that it was the defendant on the west side of the field, whom Dutton and Jackson discovered, the defendant was there confronted with the situation of some prowlers on his own premises, without any knowledge, so far as the evidence discloses, of why they were there or where they went when they left. Within a short time afterward, according to the testimony, he was assailed by a fusillade of shots coming from an unknown source and fired from the ambush of the trees outside of his

premises on the east side. He was still on his own ground. If it is true, he was carrying his rifle, but he was in the exercise of a right especially guaranteed to him by our Constitution, to bear arms for his own defense: Const., Art. I, § 27. Attacked, as the testimony shows, from ambush without knowledge of the number or character of his assailants, he had the right to act upon the appearance of danger thus brought about. He was not bound or controlled by the actual purposes of the decedent, which to him were unknown and which he had no means of ascertaining. To admit this testimony is a misapplication of the doctrine of the majority opinion in *State v. Farnam*, 82 Or. 211 (161 Pac. 417, Ann. Cas. 1918A, 318). There, one of the principal questions in the case was the identity of the charred remains found in a barn which had been burned. It was important to show that the decedent, Edna Morgan, had gone to that barn with the defendant, and hence the majority of the court decided that the state was entitled to show that on the day previous to the homicide she had said she could not go home with some girl friends of hers, because the defendant was coming to see her. Here, no such situation arises. No question was made about the identity of the decedent. The homicide was admitted. The defendant relied upon self-defense. Under these circumstances to admit testimony such as was given by Patrick, and that, too, in rebuttal, is to allow an antagonist in anticipation of an affray to make a self-serving declaration to his friends of a harmless design on his part, when in fact he is going out to snipe at his adversary.

In principle, the situation presented is similar to that portrayed in *Wirth v. Richter*, 63 Or. 114 (126

Pac. 987). There Richter's contention was that he had employed Wirth to attend a sale and buy a horse for the former, and that, having bought the horse for him, Wirth had overcharged him in the claim for reimbursement. Wirth maintained that he bought the horse on his own account and afterward sold it to Richter, and to sustain his theory offered to prove that before he went to the sale he stated to several people, but in the absence of Richter, that he, Wirth, was going to buy the animal for himself. The court, Mr. Justice MOORE writing the opinion, said:

"The declarations undertaken to be proved were self-serving and, being no part of the *res gestae*, they were inadmissible."

So here, the declarations of Stewart made in the absence and without the knowledge of Butler were self-serving, no part of the *res gestae*, irrelevant and incompetent as against the defendant. If Stewart had lived and appeared as a witness for the state in a prosecution of Butler for assault with intent to kill, he would not have been permitted to state his previous declarations to other parties not in the presence and without the knowledge of the defendant. The fact that he died cannot in sound reason make those declarations competent evidence. Where the liberty of a defendant is involved, the rule of evidence ought to be at least as favorable to him as in a dispute about a horse trade.

In the absence of any showing whatever that the defendant knew the alleged peaceful purpose of the decedent, such testimony cannot properly be admitted against him. The whole theory of the prosecution was to control the defendant by the possibly harmless attitude of the people who were prowling about his premises at night, whereas the consensus

of authority is that the defendant is entitled to act upon the reasonable appearance of danger, as it would seem to a reasonable man in his situation at the time, although there was in fact no danger, as the sequel would prove.

The majority opinion sanctions a gross misrepresentation of the testimony by the prosecutor, a practice condemned by a great multitude of precedents, including our own decisions. It authorizes a judge to lecture the jury, a co-ordinate branch of his court, as though it were composed of willful school-boys and to dragoon it into a verdict. It compels a defendant at his peril to be able to show in his defense that his assailant intended to commit a felony or that the appearances were indicative of felonious intent, irrespective of the fact that great bodily harm may be inflicted upon an individual without the commission of any actual felony, and lastly, the defendant is bound by what his antagonist may have previously said in a self-serving declaration, without regard to the appearances of danger created by the latter.

For these reasons I dissent from the conclusions of the majority of the court.

Argued January 14, affirmed and remanded for supplemental proceedings March 9, rehearing denied May 18, 1920.

MURPHY v. WHETSTONE.

(188 Pac. 191.)

Vendor and Purchaser—No Vendor's Lien on Conveyance in Consideration of Future Support of a Third Person.

1. Where a conveyance of land is made in consideration of future support of a third person, no vendor's lien arises.

Liens—Equity will Create Lien on Property to Carry Out Agreement to Support Third Person.

2. Where a conveyance of property is made in consideration of the future support of a third person, upon a breach of the conditions by the grantee, equity will then create a lien or charge on the property to carry out the spirit and intent with which the conveyance was made.

Guardian and Ward—Guardian Entitled in Equity to Recover Amount Expended in Support of Incompetent from Grantee of Land Agreeing to Support the Incompetent for Life.

3. Where a mother conveyed land to certain children in consideration of their promise to support after her death an incompetent child, and during her life the mother releases them from the promise, and after her death a guardian appointed for the incompetent person in good faith brings an action to set aside the release, and in such proceeding learns for the first time that the grantees had orally agreed at the time of the release to support the incompetent, defendants affirmatively alleging such oral contract and their readiness to comply therewith, the guardian should receive a reasonable compensation for support of the incompetent while under his care, and until the grantees again assume his care and support.

From Jackson: FRANK M. CALKINS, Judge.

Department 2.

David and Almira Whetstone, husband and wife, were pioneers of Rogue River Valley, where they reared a large family. The defendant H. F. Whetstone is one of their sons, and Della M. Whetstone is his wife. Another son is W. M. Whetstone, who is feeble-minded and more or less a cripple. David Whetstone died prior to November 4, 1898, leaving his widow, Almira, the sons H. F. and W. M. Whetstone and other children surviving him.

The joint property of the parents consisted of money and mortgages and some acreage of good land in Jackson County. The realty over which this litigation arose lies between Medford and Jacksonville. It is valuable, productive land. At the time of David Whetstone's death all of the property had been conveyed to Almira Whetstone except that portion which had been divided among their children. On November 4, 1898, all of the children except

W. M. Whetstone had received from their parents, by gift or purchase, conveyances of different tracts of land. As a rule, in such conveyances a life estate was reserved to the parents, who were thrifty and close in their dealings.

W. M. Whetstone could not transact any business or provide for himself and could do but very little manual labor. On November 4, 1898, Almira Whetstone executed to the defendants Whetstone her deed for the lands described in the complaint, known as the 55-acre tract, reserving a life estate therein. At that time the following instrument was executed:

"This article of agreement, made and entered into this fourth day of November, A. D. 1898, by and between Henry Francis Whetstone and Della M. Whetstone, husband and wife, of the county of Jackson and state of Oregon, and Almira Whetstone, of the same place, witnesseth:

"That whereas William M. Whetstone, the son of said Almira Whetstone and the brother of Henry Francis Whetstone, is dumb and crippled, and by reason thereof unable to do manual labor or transact business of any kind whereby to make his living, and is therefore unable to maintain and support himself;

"And whereas the said Almira Whetstone desires to make provision for the proper care, maintenance, and support of the said William M. Whetstone during his natural life, from her property in case of her death, and for said purpose has on the date hereof conveyed to the said Henry Francis Whetstone and Della M. Whetstone the following described real estate, to wit: * *

Now, therefore, in consideration of the premises and of said conveyance of said real estate to us by the said Almira Whetstone as aforesaid, we the said Henry Francis Whetstone and Della M. Whetstone, do hereby covenant, promise, and agree to and with the said Almira Whetstone, her heirs and devisees, that from and after the date of her death, during

the remainder of the natural life of the said William M. Whetstone, we will, at our own cost and expense, well and suitably maintain, support, and provide for the said William M. Whetstone, and will supply him a home with us in our family and treat him in every manner and respect as a member of our family, and supply him with all the necessaries and comforts of life, including food, clothing, medicine, medical attendance and nursing when sick, and other necessaries and comforts of life of equally as good quality and character as we shall supply or furnish for ourselves or any other member or members of our family, and will in every way and manner treat and care for him and for his comforts as faithfully and well as we do for any member of our own family so long, however, as he shall remain in his right mind and shall submit to our reasonable control and management, but nothing in this contract shall be so construed as to require us or either of us to maintain, support, or care for said William M. Whetstone in case from his insanity (should he become insane or unmanageable) or other cause it shall become necessary to send him to an asylum or shall be impossible for us to manage, control, and keep him at and in our home as a member of our family as aforesaid and in reasonable manner in which we have hereinabove agreed to care for, support, and maintain him during the said remaining period of his life.

“In testimony whereof we have hereunto subscribed our names and affixed our seals this fourth day of November, A. D. 1898.

“HENRY F. WHETSTONE. [Wafer]

“DELLA M. WHETSTONE. [Wafer.]”

This was recorded on October 22, 1904, in the records of deeds of Jackson County.

On September 1, 1909, the defendants Whetstone sold and conveyed the 55-acre tract to a man named Parker for \$10,700 cash, all of which, under the instructions of Almira Whetstone, was then paid to H. F. Whetstone. At the instance of the purchaser,

to insure him a good title, the following written instrument was executed and acknowledged by Almira Whetstone:

“Whereas on the fourth day of November, A. D. 1898, the undersigned Almira Whetstone entered into an agreement in writing with Henry Francis Whetstone and Della M. Whetstone by which she conveyed to them certain lands and tenements in Jackson County, Oregon, which are more fully and accurately described in the deed therefor, made by me to them, and which deed bears the date the 4th day of November, A. D. 1898, and is recorded in Vol. 36 of the Deed Records of Jackson County, Oregon, on page 31 thereof, to which deed reference is made for a more particular description of the lands affected by this agreement, and in said deed I reserved to myself the absolute use and possession of said premises during the period of my natural life, and on the same date and at the same time above mentioned the said Henry Francis Whetstone and Della M. Whetstone by their agreement in writing entered into an obligation to me, whereby, in consideration of my making and conveying to them the premises above referred to and described, they obligated themselves to make provision for the proper care, maintenance, and support of William M. Whetstone, the dumb and crippled brother of said Henry Francis Whetstone, and supply him with a home after my decease and during the balance of his natural life; and whereas, it is the desire of myself and the said Henry Francis Whetstone and Della M. Whetstone that said contract be and the same hereby is abrogated; and whereas, myself and all other parties to said deed and contract desire to sell said lands described in said deed and contract free from all obligation and liability of any and every kind and character whatsoever.

“Therefore, in consideration of five dollars to me in hand paid and other good and valuable considerations to me paid, I hereby release and discharge said Henry Francis Whetstone and Della M. Whet-

stone from all liability under said contract, * * and I do also release the lands described in the deed above referred to from any lien, claim, or demand whatsoever for the care, support, and maintenance of the said William M. Whetstone, and from any and all claims and demands of any kind and character whatsoever."

About October 1, 1915, upon a duly verified petition and by an order of the County Court for Jackson County, the plaintiff L. A. Murphy was regularly appointed guardian of the person and estate of W. M. Whetstone, qualified then, and has at all times since been such guardian. In the proceedings therefor citation was duly executed to the defendants Whetstone to appear and show cause why the plaintiff should not be appointed as such guardian. They appeared, and, setting up the contract of November 4, 1898, the petitioner then pleaded the subsequent agreement of September 1, 1909, as a release from that contract. The defendants then withdrew their appearance in the County Court proceedings and refused to plead further. That court thereupon made an order by which the plaintiff was appointed such guardian.

On another petition in the same court the defendant H. N. Lofland was duly appointed and qualified as administrator of the estate of Almira Whetstone, then deceased. After the death of her husband she and the son W. M. Whetstone lived with the defendants Whetstone, and the feeble-minded son continued to live with them after the death of his mother until the plaintiff was appointed his guardian, when he was taken away, and ever since has resided with his guardian, who is the husband of Alice Whetstone, a sister of H. F. and Della M. Whetstone.

The complaint is founded upon the theory that on September 1, 1909, when the lands were conveyed to Parker, Almira Whetstone was aged and mentally infirm; that she was unduly influenced by the defendants Whetstone; that there was no consideration for such conveyance; that the deed to the defendants Whetstone was executed and delivered in trust and as a guaranty for the support of the said W. M. Whetstone for the period of his lifetime after her death; that she was wrongfully induced to join in the execution of the deed to Parker and to relieve the defendants of their contract to care for and support W. M. Whetstone, which was the only consideration for her conveyance to them; and that the defendants took and appropriated to themselves the \$10,700, for which they have never accounted and refuse to account to anyone. The plaintiff as guardian prays for a judgment against the defendants Whetstone for \$10,700, less a 5 per cent commission on the sale, and interest, and that a lien for the payment thereof be impressed against the property which was purchased by the defendants Whetstone with the proceeds of the sale of the 55-acre tract, as such acquired lands are described in the complaint.

The defendants Whetstone admit the appointment of L. A. Murphy as guardian of W. M. Whetstone as alleged, his qualification, the execution of the deed and contract of November 4, 1898, and the subsequent agreement of September 1, 1909. They affirmatively allege that, notwithstanding the execution of the latter instrument, it was agreed that they should "be and remain fully bound to do and perform all the covenants and agreements of said Exhibit A, the same as though the agreement Exhibit B had never been entered into, and that the sole

effect of said Exhibit B should be to render the title to said premises acceptable to said Parker." Those defendants further plead that since the execution of the deed of November 4, 1898, "subject only to the right of possession therein reserved by said Almira Whetstone," they were the exclusive owners of the 55-acre tract and all of the proceeds from the sale thereof, and that the conveyance to them was absolute, founded upon their contract, which they had kept and performed and were ready and willing to fulfill.

As a reply the plaintiff alleges that "any such pretended contract has been by said Henry Francis Whetstone and Della M. Whetstone totally, wholly, and entirely violated"; that ever since the death of Almira Whetstone said defendants "have each failed, refused, and neglected" to supply said William M. Whetstone with a home with them and their family and to treat him as a member of their family, have failed and neglected to supply him with the necessities and comforts of life suitable to his station, * * and have violated all of the terms and conditions of the contract by which the conveyance of the 55-acre tract was made.

The Circuit Court found that at the time of the conveyance the land was worth from \$1,800 to \$2,200; that in the year 1909 there was a material increase in its value, and that it was then sold to Parker for \$10,700; that, notwithstanding the conveyance to Parker and the release then executed, it was never intended that the defendants Whetstone should be relieved from their contract to maintain and support W. M. Whetstone; that the full purchase price of the land was paid to the defendant H. F. Whetstone under the instructions of Almira Whetstone; that

the latter acted "upon her own volition and was competent at said time to transact her business"; that after her death in 1913 the defendants "carried out the terms and conditions of their contract to support and care for the said William M. Whetstone until in September, 1915, at which time, in pursuance of the guardianship proceedings instituted by plaintiff in the County Court of Jackson County, Oregon, the said William M. Whetstone was, without the consent of H. F. and Della M. Whetstone and against their protest, taken from the care and custody of said H. F. and Della M. Whetstone"; that these defendants were "at all times willing to, and did, comply with the terms and conditions of their said agreement," and should be and are now "required to comply with the terms and conditions of the said contract to support and care for the said William M. Whetstone"; that the lands of H. F. Whetstone, purchased with the proceeds of the sale of the 55-acre tract, should not be impressed with a trust for the benefit of W. M. Whetstone; that it was never the intention of the defendants and their grantor that "the said lands should be impressed with any such trust or obligation"; that the conveyance was absolute, by reason of which they became the owners of the land in fee simple, and that the consideration therefor "was the agreement on the part of said defendants H. F. and Della M. Whetstone to support and care for said William M. Whetstone in accordance with the terms and conditions of their said contract with the said Almira Whetstone." Based upon such findings, the court rendered a decree that the contract is now in full force and effect; that the defendants Whetstone "are required to support and care for the said William M. Whetstone mentioned in the pleadings therein at their place of residence

and in the manner provided in said contract''; and that the complaint should ''be and hereby is dismissed.'' The plaintiff appeals.

AFFIRMED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. A. E. Reames*.

For respondents, Whetstone, there was a brief with oral arguments by *Mr. Gus Newbury* and *Mr. Porter J. Neff*.

For respondent, H. N. Lofland, there was a brief submitted over the name of *Mr. Newton W. Borden*.

JOHNS, J.—W. M. Whetstone was helpless and feeble-minded, and his mother cared for and looked after him during her lifetime. It is apparent that it was her intention to make ample provision for his support and maintenance during the remainder of his life after her death, and that the conveyance of the 55-acre tract to her son H. F. Whetstone and his wife was made in good faith for that purpose. There is no evidence tending to show the probable or reasonable cost of that maintenance; but it appears that the land then had a minimum rental value of \$125 a year, and a maximum of \$250. The conveyance of the 55-acre tract of the Whetstones was absolute and ''in consideration of the premises and of said conveyance of said real estate.'' The grantees covenanted and agreed that ''during the remainder of the natural life of said William M. Whetstone we will at our own cost and expense well and suitably maintain, support, and provide for said William M. Whetstone,'' supply him with a home, treat him as a member of their family, and

furnish him with the necessities and comforts of life suitable to his station, of "equally as good quality and character as we shall supply and furnish for ourselves or any other member of our family," so long as he should remain in his right mind and submit to their reasonable control and management. It was stipulated that the contract should not be so construed as to require the grantees to support or care for W. M. Whetstone in case of his becoming insane, if it should become necessary to remove him to an asylum or if it should be impossible to keep him at their home as a member of their family.

At the time of the sale of the 55-acre tract to Parker, on September 1, 1909, Almira Whetstone executed the instrument whereby she purported to "release the lands described in the deed above referred to from any lien, claim, or demand whatsoever for the care, support, and maintenance of the said William M. Whetstone and from any and all claims and demands of any kind or character whatsoever." Notwithstanding the fact that she then had a dower interest in the lands, by her written instructions the full amount of the purchase price was paid to her son H. F. Whetstone. The instrument of September 1, 1909, was not signed by the defendants Whetstone, but it was for their use and benefit. As a result of its execution the land was sold, and they received the proceeds of sale.

After the death of the mother, W. M. Whetstone continued to live with the defendants Whetstone, who provided for his care and support until the plaintiff was appointed his guardian. Although there is a sharp conflict in the testimony and some of it tends to show that they were derelict in their duty, we think that the evidence supports the findings of the Circuit Court to the effect that the Whet-

stones were substantially complying with the terms of the written contract at the time the guardian was appointed. The original contract was in writing, and it was the only consideration for the conveyance of the 55-acre tract to them. The instrument executed on September 1, 1909, on its face purports to be a full and complete release of the Whetstones from any and all liability under the contract. The fact remains that they received all of the proceeds of the sale; that the sale was made before any liability attached to them under the contract; that after the execution of that release there was remaining no evidence of their continuing liability; and that without such liability there would not be any consideration for the original conveyance by Almira Whetstone.

It is also true that at no time was such liability on the part of the defendants Whetstone known until the answer was filed and their testimony was taken in this suit. Prior thereto, and after the death of the mother, all of such evidence was in parol and within the personal knowledge of the Whetstones only. Although after the death of the mother they continued to care for the feeble-minded son, there is no evidence that they were doing so in compliance with the terms of the contract, that the instrument continued to be binding upon them; that it was their intention to carry out its provisions, or that it remained in legal force and effect. It was under such a state of facts that the plaintiff applied to the County Court and was by it appointed guardian of the person and estate of W. M. Whetstone, that Lofland was appointed administrator of the estate of Almira Whetstone, deceased, and that this suit was brought.

The mother, who executed the deed and the release at the time of the sale, is dead, and her son whom she sought to protect is feeble-minded and not a competent witness. Whatever may be the actual facts, the evidence tends to show that she knew and understood what she was doing and was not acting under any undue influence.

This case depends upon the legal force and effect of the deed of the 55-acre tract from Almira Whetstone to H. F. and Della M. Whetstone, the contract for the maintenance and support of the feeble-minded son, the purported release of that contract, and the subsequent proceedings and conduct of the parties.

1. It has been settled by numerous decisions of this court that there is no vendor's lien in this state. The conveyance here involved was absolute and passed a fee-simple title to the grantees. The consideration therefor was the agreement to provide for and support W. M. Whetstone for the remainder of his life after the death of his mother. In *Perry on Trusts* (6 ed.), Section 235, it is said:

"If the vendor makes the sale for the consideration of his future support, no lien will arise."

In *McCandlish v. Keen*, 13 Grat. (Va.) 615, 630, it was held:

"The conveyance is in consideration of the covenant of the grantee that his estate shall pay the annuity, and the vendor's lien does not attach upon the property. * *

"Upon the whole, I feel no doubt that Mrs. Byrd was content with the personal security of Coke, and that at the time of executing the instrument, neither party contemplated or thought of a lien. And to set it up here would be to carry the doctrine further than it has ever yet gone, which, in view of the ex-

pressions of eminent judges against the policy of such a lien and the marked sense of the legislature in its total abolition by statutory enactment, I certainly am not prepared to do."

In *McKillip v. McKillip*, 8 Barb. (N. Y.) 552, it is said:

"Thus, where A. conveys land to B., and in consideration thereof B. covenants with A. to support and maintain him and J., his lunatic son, the covenant creates no lien upon the land in favor of J.
* *

"It follows, therefore, that the bond could not be declared an equitable encumbrance on the land, even in behalf of the obligee, Archibald, and *a fortiori* in behalf of the lunatic, who is merely a beneficiary."

In *Arlin v. Brown*, 44 N. H. 102, 105, the rule is thus stated:

"No such lien will exist where no purchase money is agreed to be paid for the land, but where the only consideration for the conveyance is the agreement of the vendee to support and maintain the vendor during the life of such vendor. * *

"The sole consideration for the conveyance was the parol agreement of Sarah Brown, stated in the bill. When that agreement was made the consideration was paid as the parties agreed. If it was not, still it was an agreement not for the payment of purchase money, but for certain personal services of the most indefinite and unascertainable character; and for a nonperformance of which a recovery could only be had of damages altogether unliquidated and uncertain. It has not been held anywhere, so far as we have been able to find, that any lien exists for the performance of such a contract."

In *Brawley v. Catron et al.*, 8 Leigh (Va.), 522, it is held that:

"The agreement for supporting the vendor and his daughters constitutes no lien in equity upon the land."

In *Peters et ux. v. Tunell*, 43 Minn. 473, 476 (45 N. W. 867, 19 Am. St. Rep. 252), we find:

“The contract was not to be performed by a single act, and once for all; but performance was to extend indefinitely over a period, it might be, of many years, and was to consist of various acts besides the payment of money. What was required to be done was contingent and uncertain, depending upon future events impossible to be calculated or ascertained, and this uncertainty as to what was to be done would continue indefinitely. There was no lien, unless it existed from the beginning, at the time of the conveyance, and before any obligation had become defined, certain, and ascertainable. It certainly has not been generally supposed that the doctrine of vendor's lien extended to contracts of such a nature.”

In *Abbott v. Sanders*, 80 Vt. 179 (66 Atl. 1032, 130 Am. St. Rep. 974, 12 Ann. Cas. 898, 13 L. R. A. (N. S.) 725), it is held:

“A conveyance conditioned upon the furnishing of support to the grantor may, upon breach of the condition, be foreclosed by bill as though it were a mortgage.”

In the notes in 13 L. R. A. (N. S.) 725, we find:

“It appears to be well settled that an implied equitable lien does not exist in favor of a vendor of real estate to secure the consideration therefor, when such consideration is the maintenance and support of the grantor during life, some cases stating as the reason therefor that the charge is of too uncertain and indefinite a character [authorities]; while in other cases a lien is denied upon the ground that the covenant of the vendee is substituted for the purchase money, or as a mode of payment of the price of the land, and therefore the land is discharged of the lien [citing authorities].”

In *Burroughs v. Burroughs*, 164 Ala. 329 (50 South. 1025, 137 Am. St. Rep. 59, 20 Ann. Cas. 926, 28 L. R. A. (N. S.) 607), the opinion says:

“No vendor’s lien exists where the consideration for the conveyance of land is an agreement to support the grantor during life.”

2. The authorities are also uniform on the proposition that, where such a conveyance is made and there is a breach of the conditions, equity will then create a lien or charge upon the property to carry out the spirit and intent with which the conveyance was made. That was expressly held by this court in *Patton v. Nixon*, 33 Or. 159 (52 Pac. 1048), where the syllabus says:

“Equity will grant relief to one who has made a conveyance of property in consideration of her future support, although the plaintiff has a remedy at law, and to avoid a multiplicity of actions will make the maintenance of the plaintiff a charge upon the premises.”

It was there alleged and proved that the defendant had refused to keep and perform her agreement. Although the rule is more broadly stated in *Watson v. Smith*, 7 Or. 448, yet, when analyzed, that decision is also founded upon a failure or neglect to keep the covenants upon which the conveyance was made. Learned counsel for plaintiff has filed an exhaustive brief, but he has not cited and we have not found an authority which holds, under facts such as are shown to exist in this case, that there is or was an equitable lien on the 55-acre tract in favor of W. M. Whetstone.

The facts are peculiar. The execution of the original contract for support and of the purported release is admitted. The plaintiff contends that the

release was procured and the proceeds of the sale were paid over to the defendants through the exercise of undue influence upon Almira Whetstone. The defendants Whetstone affirmatively allege that, notwithstanding the release, they are still bound by the parol agreement, as though the release had never been executed. As stated, the testimony does not show that there was any breach of the conditions by which the conveyance from Almira Whetstone was made, and that was the finding of the trial court. Although the original contract and release were in writing, the agreement between Almira Whetstone and the defendants Whetstone was in parol and was a matter within their exclusive personal knowledge. There is no evidence, verbal or written, tending to show that after the release was executed and prior to the filing of their answer in this suit the defendants Whetstone were bound by the original contract or that they recognized and admitted that it continued to remain in force and effect. It is true that in answering the citation of the County Court they appeared and pleaded the original contract, but when the release was introduced in evidence they did not file any further pleading showing or alleging that there had been an oral agreement with Almira Whetstone that the written contract should remain in force notwithstanding the release.

It was under such conditions that the plaintiff was appointed guardian by the County Court and obtained control of the feeble-minded W. M. Whetstone. There is no testimony tending to show that after such custody was granted to the plaintiff the defendants Whetstone notified him that the written contract was still in effect and that they were ready and willing to keep and perform its conditions; in other words, they concealed the existence of the oral

agreement with Almira Whetstone from both the County Court and the guardian who brought this suit.

3. Although for want of proof the decree of the Circuit Court must be affirmed on the merits, yet we are convinced that the suit was brought in good faith, and it resulted in establishing the legal existence of a concealed oral contract that the original pact between Almira Whetstone and the defendants Whetstone should continue in force and effect, notwithstanding the release thereof. Under the terms of the original contract the defendants Whetstone were to care for and support the feeble-minded son of Almira Whetstone during his life after the death of his mother. The guardian was appointed on or about October 1, 1915, and assumed custody of him soon thereafter. It appears from the record that at all times since the guardian at his own expense has provided a home and maintenance for W. M. Whetstone, and that the latter has no estate outside the contract which his mother made for his support. In all the circumstances we feel that it would be inequitable and unjust if the guardian should not receive a reasonable compensation for such care and support of his ward, and that in equity and good conscience the defendants Whetstone should pay the amount thereof. There is no evidence presented as to what would be a proper charge, or anything upon which this court could base a decree as to the amount. The cause is therefore remanded to the Circuit Court with leave to the parties to frame issues and offer proof as to what would be a just and reasonable charge, and with instructions to the court to render a decree in favor of the plaintiff against the defendants Whetstone for the amount which he should recover for the care and mainte-

nance of W. M. Whetstone. When the defendants Whetstone shall serve a written notice upon the guardian that they are ready and willing to take and care for W. M. Whetstone as provided in their original contract with his mother, and that they will keep and perform that agreement, they shall then be released from any further charge or liability to plaintiff; and so long as they comply with the terms of the original contract they shall be and remain free from any other obligation for his care and support. Otherwise, the decree of the Circuit Court is affirmed; neither party to recover costs in this court.

AFFIRMED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued March 11, affirmed April 13, rehearing denied May 18, 1920.

HURST v. HILL.

(188 Pac. 973.)

Principal and Agent—That Defendant Seller's Son Acted for Himself in Buying Potatoes Sold to Plaintiff Admissible.

1. In action for failure to deliver potatoes sold by defendant's minor son, in charge of his store, defendant claiming son had no authority, evidence of son that when he bought potatoes he secured them for himself with his own money *held* admissible to rebut any inference from son's having been in charge of defendant's store that potatoes were defendant's.

Trial—Instruction as to Signing of Contract Held not Erroneous in View of Rest of Instruction.

2. In action for failure to deliver potatoes sold by defendant's minor son, an instruction that it was for the jury to determine whether contract was signed by both parties at the time it was entered into is not erroneous in that it required both parties to sign at the same time in view of other part of instruction, "and this becomes one of the material questions for you to determine in the course of settlement of the issues herein presented."

Principal and Agent—Authority not Provable by Declarations.

3. The authority of an agent cannot be proved by his own declarations out of court.

Sales—Buyer Who Demands Delivery Within Reasonable Time can Enforce Contract.

4. Where no time for delivery was fixed by contract of sale, if buyer demanded delivery within reasonable time, and was then ready, able, and willing to perform, there being no delivery offered by seller at any other time, buyer would be in position to enforce the contract.

Appeal and Error—Exceptions to Instructions Partly Favorable Should be Pointed to Part Complained of.

5. Where a party is excepting to a long series of paragraphs of instructions, part of which are favorable to him, and other parts vague and ambiguous, he should point out to court particular fault complained of, or at least point his exceptions to part particularly claimed to be erroneous.

Appeal and Error—Subjunctive Instructions Based on Hypothetical Condition Held Harmless.

6. In action for failure to deliver potatoes sold, instructions subjunctive in character and based on hypothetical condition that a reasonable time for performance of the contract had expired when assigned by the buyer to plaintiff *held* harmless.

Sales—Demand Necessary to Fix Liability Where Time for Performance not Fixed.

7. Where contract of sale fixes no time for delivery, there can be no default which either buyer or seller can take advantage of until one party or other has made demand for delivery or acceptance.

Sales—Contract not Fixing Time for Delivery Lapses After Reasonable Time Without Demand.

8. If either party to a contract of sale not specifying time for delivery lets a reasonable time expire without demand, the contract lapses, and neither party can enforce performance.

Appeal and Error—Complaint cannot be Made of Too Favorable Instruction.

9. Appellant cannot complain on account of an instruction more favorable than he had a right to ask.

Evidence—Perishable Character of Potatoes Matter of Common Knowledge.

10. It is a matter of common knowledge that potatoes are a perishable product, not lasting over one season.

Sales—Five Months' Delay in Demanding Delivery of Potatoes Unreasonable.

11. Five months' delay on the part of the buyer of potatoes and his assignee in demanding delivery should be considered unreasonable as matter of law.

From Marion: PERCY R. KELLY, Judge.

Department 2.

This is an action to recover damages for the alleged breach of a contract to deliver a 15-ton carload of Burbank potatoes, of a specified size, at Jefferson, Oregon.

Several questions were presented in the case; the principal one being whether or not defendant's name was placed to the contract by his authority.

This contract purported to be signed by defendant by E. B. Hill, his son. At the time the contract was made the defendant had a store at Jefferson, Oregon. He was not, at the time, however, living at Jefferson, but at Portland, Oregon, and the store was in charge of his son as his agent. E. B. Hill, the son, was a minor still under age, but was managing the store. There was evidence that he had purchased flour and other supplies for the store, which was engaged in a retail business; but there was no evidence that he had ever purchased or sold stuff in carload lots, similar to the transaction in question.

The contract, as offered in evidence by the plaintiff, was as follows:

“Jefferson, 10-13-1916.

“I confirm sale to F. H. Coffin, one 15 ton car Burbank potatoes, #1, shipping, free from disease in good sacks, all over three inches to ten inches in length—not over ten per cent three inch stuff at \$1.25 per hundred pounds, f.o.b. Jefferson, paid for as soon as loaded.

“J. B. HILL,

“By E. B. HILL.

“I confirm acceptance.

“F. H. COFFIN.

“I hereby assign to W. S. Hurst this contract, Nov. 24, 16.

“F. H. COFFIN.”

A carbon copy of the contract was given to E. B. Hill at the time the same was signed, which was identical with the above, except that it did not have the signature of F. H. Coffin and did not have the assignment. The contract was signed on October 13th. There is no evidence of any demand by Coffin prior to the assignment to Hurst, which, the evidence of plaintiff tended to show, occurred on the twenty-third or twenty-fourth day of November.

After this there were some negotiations between Hurst and E. B. Hill (which may or may not have reached J. B. Hill, the defendant) in relation to the potatoes. There seems to have been some trouble about obtaining a car in which to ship them. At the time of the making of the contract the minimum load which would be accepted by the railroad seems to have been 15 tons, but about this time the railroad changed its rules so that the minimum car was made 18 tons, and they would not accept any smaller car. About the time of the assignment to Hurst, and immediately after, he attempted to make an arrangement with another Jefferson firm, who were shipping potatoes, to put in some of their potatoes, in the car with those covered by this purchase, so as to make up the 18 tons, but he seems to have been unable to make the arrangement. E. B. Hill (either for himself or for his father) about the same time tried to induce the plaintiff to buy three tons of other potatoes to make up the balance of the carload, but he seems to have reached no agreement with the plaintiff as to this. During these negotiations there was no definite demand by the plaintiff for the delivery of the potatoes, and plaintiff does not claim that any demand was made at that time.

So far as the evidence goes, the matter was then permitted to drop by all the parties, and was not brought up again until in March, 1917, when the plaintiff made a written demand upon the defendant for the potatoes, which was refused by the latter. In the meantime, potatoes had gone up from about \$1.25 per hundred at the time of making the contract, to in the neighborhood of \$3.50 per hundred in March.

The defendant claims that his son had no authority to sign the contract for him, or to buy or sell potatoes for him, except in a small way, by a single sack for retail purposes, and that he had no knowledge that his son had made the deal in his name, or had signed his name to the contract, until the demand was made upon him in March.

The cause was submitted to a jury who found a verdict in favor of the defendant. Upon this verdict a judgment was entered, from which the plaintiff appeals.

There were exceptions by the plaintiff, based upon the introduction of evidence and the instructions to the jury, which will be considered at length in the opinion.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Herbert A. Cooke* and *Mr. Walter C. Winslow*.

For respondent there was a brief and an oral argument by *Mr. Elmo S. White*.

BENNETT, J.—E. B. Hill, a witness for the defendant, was permitted by the court to testify, among other things, that he bought the 15 tons of potatoes with his own money, and as to where he

got the money, and that his father knew nothing about the contract to which his name was signed, and he identified three checks, given by him apparently in the purchase of the potatoes, and which were signed by his own name individually. The admission of this evidence, as to where and how he purchased the potatoes, is one of the errors alleged by the plaintiff.

1. We think the evidence under the circumstances was admissible. Plaintiff had offered evidence tending to show that E. B. Hill was in charge of his father's store, and that while so in charge he had purchased potatoes upon this order. From this evidence, if unexplained, the jury might infer that the defendant must have known of the transaction and probably assented thereto and was bound thereby. But, if the son bought the potatoes individually and upon his own deal, and paid for them with his own money, and not out of his father's money, or the store money, it tends to rebut any such inference or presumption, and for that purpose the evidence was competent.

The court, among other instructions, gave the jury the following:

“Plaintiff's own testimony—that is, the testimony of the plaintiff's witnesses—is to the effect that the signature was made by E. B. Hill. The contract, being of the character that it is, would require the assent of both parties thereto, expressed in writing and signed by both of the parties.

“You have heard the evidence in the case, and it is for you to determine whether or not the contract in question was signed by both parties at the time it is alleged it was entered into by Mr. J. B. Hill through his agent, Mr. E. B. Hill and Mr. Coffin, and this becomes one of the material questions for

you to determine in the course of settlement of the issues herein presented.”

It is claimed by the plaintiff that the court thereby told the jury that plaintiff could not recover unless the contract was signed by Coffin *at the very time* it was signed by E. B. Hill.

It is not necessary to pass upon the question of whether or not the contract had to be signed by Coffin at the very time that E. B. Hill attached his father's name, or at the time when the carbon copy (which does not appear to have been signed by Coffin at all) was given to young Hill, in order to make a valid contract. Whether or not the court would have been justified in giving such an instruction, it did not in fact so tell the jury. What the court did say to the jury was “that this becomes *one of the material questions* for you to determine in the course of settlement of the issues herein presented.”

There was a direct conflict in the testimony as to whether or not the contract was signed by Coffin at that time. There is no question but what it was material in the case, whether it was signed at that time or not, even if a signature by Coffin at that time was not absolutely and necessarily essential to a valid contract; therefore the instruction given by the court was not error in any view of the law.

3. The court also instructed the jury as follows:

“In this case any statement or declaration of authority made by the defendant's son at the time of the original transaction, is not evidence of agency which is binding upon the defendant.”

And the giving of this instruction is still another ground of error asserted by the plaintiff.

The instruction, however, was the simple declaration of the elementary rule that you cannot prove

the authority of the agent by his own declarations out of court.

This doctrine is so well settled, and so elementary, and has been so often announced by this court, that there is little room for question as to the correctness of the instruction: *Bridenstine v. Gerlinger Motor Car Co.*, 86 Or. 411, 423 (168 Pac. 73, 922), and authorities cited.

The most serious question in the case, as we view it, is in relation to the giving by the court of the following series of instructions:

“If you should find from the evidence that during such period of time following the execution of this contract as you find reasonable for performance of it, the purchaser was not ready, able and willing to receive the potatoes and pay the contract price, the plaintiff could not recover in this action, irrespective of any default upon the part of the defendant. And by referring to the purchaser in this connection, gentlemen of the jury, I desire to be understood as referring to the holder of the contract, if there was an assignment of the contract by Mr. Coffin to Mr. Hurst. Reference to purchaser includes reference to Hurst. As assignee he would then be deemed the purchaser within the assignment provision. F. H. Coffin, mentioned in the complaint should be deemed the purchaser at all times until the alleged assignment to the plaintiff.

“If a reasonable time for performance had expired prior to the time of this alleged assignment, and if during that time the said F. H. Coffin was not financially able to pay for the potatoes had delivery been tendered, or was unwilling or not ready to accept the potatoes during that period of time, he was in default, and neither he nor the plaintiff could maintain this action for the breach thereof.

“Unless, therefore, you find that the said F. H. Coffin was, during the period of performance and up to the time of the alleged assignment, ready, able

and willing to accept delivery of said potatoes and pay for the same, you should find for the defendant."

4. To these instructions there was a blanket exception. They are ambiguous and by no means definite, and it is claimed by the plaintiff that they informed the jury, in effect, that Coffin must have been "ready, able and willing" *all the time* from the making of the contract up to the assignment, in order to justify a recovery. There are some portions, especially the last clause of the last paragraph, which seem to justify this construction. In that regard, that clause of the instruction was inaccurate; for under such a contract, where no time for delivery was fixed, if the buyer made a demand for the delivery within a reasonable time, and was ready, able and willing to perform at that time, there being no delivery offered by the seller at any other time, he would be in a position, we think, to enforce the contract.

There is a question, however, as to whether a party can put himself in a position to question a series of instructions, or a long instruction like this, a part of which is incorrect and other portions ambiguous, by a blanket exception to the whole charge or series of charges: *Murray v. Murray*, 6 Or. 17, 23; *Kearney v. Snodgrass*, 12 Or. 311, 317 (7 Pac. 309); *Conklin v. La Dow*, 33 Or. 354 (54 Pac. 218).

Part of this instruction was unquestionably favorable to the defendant, notably that portion reading as follows:

"I desire to be understood as referring to the holder of the contract, if there was an assignment of the contract by Mr. Coffin to Mr. Hurst. Reference to purchaser includes reference to Hurst. As assignee he would then be deemed the purchaser within the assignment provision. F. H. Coffin men-

tioned in the complaint should be deemed the purchaser at all times until the alleged assignment to the plaintiff."

5. It would seem, as a matter of fairness to the court, where a party is excepting to a long series of paragraphs like this, part of which were favorable to him, and other portions vague and ambiguous, that the party so excepting should point out to the court the fault complained of, or at least should point his exceptions to the particular portion of the charge claimed to be definitely erroneous, so that the court may correct it if he sees fit.

6. However, assuming that the exception was sufficient to present the question, we are of the opinion that however erroneous the instruction may have been, it could not have injured the plaintiff. It was subjunctive in its character, and based upon the hypothetical condition, *that a reasonable time for the performance of the contract had expired*, at the time the assignment of the contract was made to Hurst, and the question of whether or not such a reasonable time had expired was submitted to the jury.

7. This being a contract in which no time for delivery was fixed by the terms of the instrument itself, it is conceded by the briefs of both the appellant and the respondent that there could be no default which either the buyer or the seller could take advantage of, until one party or the other had made a demand for delivery or acceptance. And this is unquestionably the law.

"If no time is fixed for delivery the buyer must make a demand": 35 Cyc. 165.

"Neither party could put the other in default, without performance or an offer to perform upon his part": *Longfellow v. Huffman*, 49 Or. 486 (90 Pac. 907).

“If both parties are present and neither of them tenders performance, then both are in default and neither of them can sue the other for the breach”: *Catlin v. Jones*, 52 Or. 337 (97 Pac. 546).

8. And we think it equally clear, that if either party lets a reasonable time expire, without a demand, then the contract lapses, and neither party can enforce a performance: *Hume v. Mullins*, 18 Ky. Law Rep. 108 (35 S. W. 551).

There was no evidence whatever of any demand by Coffin prior to the assignment to Hurst, and indeed there was no evidence of a demand by anyone until March, 1917.

Under this state of facts, if a reasonable time for the performance of the contract had expired, at the time of the assignment by Coffin to Hurst, the contract had lapsed and the plaintiff would have had no right to recover, and the court might safely have instructed the jury that, if a reasonable time for the performance of the contract, and for a demand for performance, had lapsed at the time of such transfer (there being no evidence of a demand prior to that time), then the plaintiff could not recover.

9. The court, however, did not go so far as that, but assumed that the plaintiff could recover, notwithstanding the fact that he had made no demand, even if a reasonable time for the performance of the contract had expired prior to the transfer by Coffin, if he had been ready and willing to perform during that time. The instruction given therefore, while not accurate as an abstract proposition of law, was more favorable to the plaintiff, under the undisputed facts of the case, than he had a right to ask.

We are of the opinion, therefore, that there was no reversible error at the trial and that the judgment should be affirmed.

We are more satisfied with this conclusion because of the long delay on the part of Coffin and Hurst in demanding the performance of the contract. The contract, as we have seen, was dated October 13, 1916, and there is no contention on the part of the plaintiff that any demand was made until in March, 1917, or about five months after the date of the contract, and after the market price of potatoes had gone up from \$1.25 to \$3.50 per hundred, or almost 200 per cent.

10. It is a well-known fact that potatoes are a perishable product. They do not last over one season, and if they are stored for any considerable time, they must be sorted and resorted and deteriorate rapidly both in weight and quality. They are also subject to great and sudden fluctuation in values.

If potatoes had gone down to 50 cents a hundred between October and March, instead of going up to \$3.50, it would not seem reasonable that the defendant, without offering to deliver from October until March, should then have made up a car and demanded that the plaintiff take them and pay \$1.25 a hundred. Neither does it seem reasonable that the plaintiff should lie by for three or four or five months, without making any demand for performance, and then come in and ask that the defendant should be compelled to deliver, when potatoes had gone up to three times their value at the time of the making of the contract.

In *Hume v. Mullins*, 18 Ky. Law Rep. 108 (35 S. W. 551), the Supreme Court of Kentucky held that a contract for the sale of whisky in bond, which was in terms very much like this one, had lapsed as a matter of law, where the buyer made no demand

for a year and the price of whisky had advanced in the meantime, and that the demand was not made in a reasonable time. Whisky in bond is not a perishable product, but will continue in good condition for many years.

11. If, in the matter of a product like that, which is not perishable, a year is, as a matter of law, an unreasonable time for the buyer to delay making a demand, it would seem that five months, where the property was a perishable commodity like potatoes, and subject to so much fluctuation in value, ought to be considered unreasonable.

The court below submitted the question to the jury as a question of fact, and we think on the whole the rulings of the court were quite as favorable to the plaintiff as he could ask.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued March 23, affirmed April 20, rehearing denied May 18, 1920.

STAR SAND CO. v. PORTLAND.

(189 Pac. 217.)

Damages—Where Damages Uncertain Contract Fixing Reasonable Amount for Delay is Valid.

1. A provision in a contract for the construction of municipal improvements that for each day's delay in completing the improvement the contractor should as liquidated damages pay to the city \$10 is valid and enforceable, for the amount of damage would be practically incapable of computation, and hence the provision could not be treated as penalty.

[As to stipulated forfeiture for breach of contract as penalty or liquidated damages, see the notes in 1 Ann. Cas. 244; 10 Ann. Cas. 225; Ann. Cas. 1912C, 1021; Ann. Cas. 1917D, 585.]

Pleading—Reply Alleging Waiver of Stipulation in Contract Sued on Held a Departure.

2. Where plaintiff alleged performance of contracts for the construction of municipal improvements, and on the city's averment that defendant failed to complete within time, and so was liable under provision for payment of stipulated sum per day as liquidated damages, reply alleging waiver of the provision was a departure.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 2.

The plaintiff is an Oregon corporation, and in 1908 entered into seven different written contracts with the defendant, which were identical in form, for the improvement of a number of its streets. Except as to the particular streets, time of performance, date of completion, and the amount of stipulated damages, differing in the instruments, each contract contained the following provisions:

"The work shall commence within 10 days after the awarding of this contract, and [be] prosecuted with such vigor that all the work embraced in this contract shall be entirely completed by the 29th day of July, A. D. 1908.

"It is hereby agreed that, in view of the character of the work to be done, the said city of Portland will suffer damages to the extent of \$10.00 per day for each and every day that the completion of said work is delayed beyond the 29th day of July, A. D. 1908.

"And it is further agreed that, in case said work shall not be completed on or before said last named date, the party of the first part shall pay to the city of Portland, as fixed and liquidated damages, the sum of \$10.00 for each and every additional day required to complete said work, which shall be retained out of any money due or to become due under this contract."

In the first cause of action the complaint alleges that the defendant enacted ordinance No. 17,881, providing for the time and manner of improving Fargo

Street in the City of Portland, from the east line of Williams Avenue to the west line of Union Avenue, in front of and abutting upon blocks 8, 9, 12, and 13 of Williams Avenue Addition to said city; that the ordinance was duly approved by the mayor; that thereafter bids for the improvement were regularly advertised for and received; that the contract was awarded by the defendant to the plaintiff; that it was reduced to writing and was duly signed by each party; and that the plaintiff agreed to complete the said improvement for \$5,331.64. It is then averred:

“That thereafter the plaintiff furnished the required bond and entered into the performance of said contract, and completed the same in substantial accordance with the terms thereof.

“That thereafter all the work done under said contract was accepted by said defendant through its duly authorized authority, the Executive Board”

—and further, that by the terms of said written contract it was the duty of the defendant to provide a special fund out of which the cost of improvement should be paid; that the amount thereof should be created by the levy of an assessment upon the property benefited by the improvement, the entire cost of which was to be borne by the owners of such property; that the city made the assessment and received therefrom the sum of \$5,682.66, on or about October 1, 1909; that there became due and owing from the defendant to the plaintiff, under the contract and for extras, \$5,331.64, no part of which has been paid except the sum of \$5,311.64; and that the balance of \$20, with interest from October 1, 1909, remains due and unpaid by the defendant to the plaintiff.

There are six other separate causes of action, with similar allegations, founded upon like contracts, for

all of which the plaintiff prays judgment for \$1,440 with interest.

The defendant admits the execution of the respective contracts, denies all other material allegations of the complaint, and for a further and separate answer to the first cause of action avers "that the plaintiff failed and neglected to complete the said contract and said improvement until March 4, 1909, which was eighty-three days after the time required" for its completion; that it forfeited to the City of Portland the sum of \$10 a day for 83 days, \$830 in all; that the executive board of the city granted to the plaintiff an extension of time for 80 days and thereby relieved it of the forfeiture of \$800; and that the plaintiff "has been fully paid and compensated for all materials furnished and work performed under said contract." Like defenses are made to each cause of action.

As a reply the plaintiff denies the new matter of the answer, and further alleges:

"That plaintiff was prevented from completing the work under said contract by the time stipulated therein, because of interference on the part of the defendant in delaying the completion of connecting improvements, and in preventing and rendering it impossible for plaintiff to have the free access to the place at which its work was to be performed requisite for the proper and expeditious performance thereof; that in and by the specifications which formed a part of the contract between the parties it was stipulated and agreed that the street under construction should be rolled by the defendant's roller; that defendant failed and refused to furnish same as and when it was reasonably required by plaintiff in order to complete its work by the time stipulated; and that by its said acts and omissions the said defendant itself prevented the completion by

plaintiff of the said contract within the time stipulated.”

There was a trial by jury. The defendant offered no testimony, and, when plaintiff rested, moved for a judgment of nonsuit as to each cause of action, on the ground that there had been a failure “of proof on the part of the plaintiff to show performance or excuse for nonperformance of its contracts.” The plaintiff moved for a directed verdict on the ground that there had been a failure of proof on the part of the city as to any damages sustained on account of the delay. Both motions were overruled, and the jury returned a verdict for the defendant, upon which judgment was entered. The plaintiff appeals therefrom, charging that the defendant’s further and separate answers do not state facts sufficient to constitute a defense; that it is not alleged therein that the defendant suffered any damage as a result of the delay in completing the contracts; that the court erred in overruling plaintiff’s motion for a directed verdict; that it appears that the defendant was the agent or trustee of the plaintiff for the purpose of collecting from the property owners the amount of the special assessment; that it did not allow them any credit for damages on account of such delay, but collected the full amount due to the plaintiff under the contract; that the city is thereby estopped from asserting that there was any damage; that it affirmatively appears that much of the delay was caused by the defendant; that by reason thereof the stipulation for liquidated damages became inoperative; that the defendant could recover only the actual damages occasioned by the delay; that the trial court erred in instructing the jury “that the defendant had the right to deduct the amount withheld

as liquidated damages for delay," in that there was no evidence in the record that any damage whatsoever had been sustained; and that it erred "in withdrawing from the consideration of the jury the evidence that the city had collected the full contract price from the property owners without deducting therefrom the amount claimed as damages for delay."

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. S. J. Bischoff* and *Messrs. Beach, Simon & Nelson*, with oral arguments by *Mr. Bischoff* and *Mr. Roscoe C. Nelson*.

For respondent there was a brief over the names of *Mr. Lyman E. Latourette*, Deputy City Attorney, and *Mr. C. C. Hindman*, Deputy City Attorney, with an oral argument by *Mr. Latourette*.

JOHNS, J.—1. Where the damages are certain, or can be made so, as a rule a stipulation as to the amount thereof will be held to provide for a penalty, and therefore will not be enforceable as a stipulation, but—

"On the other hand, if the subject matter of the contract is of uncertain value, or if the damages arising from a breach are uncertain or difficult to ascertain with any degree of accuracy, the uncertainty and difficulty constitute an element very persuasive in the direction of holding that the amount stipulated to be paid, in the event of breach, being in itself not unreasonable or oppressive, is liquidated damages": *Webster v. Bosanquet*, Ann. Cas. 1912C, note 1026.

The rule "applies with especial force to contracts with municipalities for the erection, construction, or operation of public works, for the breach of which

there can be no adequate measure of damages": *Id.*, p. 1028.

In *Salem v. Anson*, 40 Or. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169), the principle is thus stated:

"Where a city has required from the grantee of a public franchise a bond conditioned that the terms of the grant shall be complied with, and the bond has been tendered and accepted, the sum specified in such bond is substantially a statutory penalty, and, upon a breach of the bond, the entire sum may be recovered, without proof of special injury."

Learned v. Holbrook, 87 Or. 576 (170 Pac. 530, 171 Pac. 222), holds that—

"Where the parties by contract stated a reasonable sum as liquidated damages, neither could urge that the damages were greater or less than the amount agreed upon."

In this class of cases, where the complaint is founded upon specific performance of an admitted contract which provides for stipulated damages on account of delay, and the amount thereof is reasonable, the parties are bound by the stipulation, and no further proof of damages is required. In the instant case the amount agreed upon is reasonable.

2. As we construe the pleadings, the complaint is founded upon written contracts which are definite and certain in their terms as to the time and manner of performance. The plaintiff alleges specific performance. The defendant admits the execution of the contracts but denies that the plaintiff kept or performed their terms and conditions, charging in particular that it failed to complete the work within the time called for by the contracts; that by reason thereof the defendant suffered, as to the first cause of action, "damages to the extent of \$10 per day for

each and every day that the completion of said work'' was delayed beyond July 28, 1908, after the expiration of the extensions which the city admits were granted; and that after deducting the amount of such damages the plaintiff has been paid in full. In legal effect the reply admits that the plaintiff did not complete the work within the time set, but alleges that the delay was caused by the neglect of the city, and that the plaintiff was not responsible. Not one of the contracts was completed within the required time. Different extensions were granted, and for the delay thereafter deductions were made by the defendant for the stipulated damages provided in the respective contracts.

The proof shows that the plaintiff does not seek to recover upon the original agreements, but that its claim is based upon the contracts as extended and modified between it and the city. The defendant insists that by reason thereof the reply is a departure from the complaint and that plaintiff cannot recover on the strength of its reply. Under the decisions of this court that contention must be sustained. The complaint does not assert that there was a waiver of the time within which the contracts were to be completed, or that the city was estopped by its conduct to rely upon the terms of the instruments. In *Long Creek Building Assn. v. State Insurance Co.*, 29 Or. 569 (46 Pac. 366), the opinion holds the rule to be well settled that:

''A plaintiff cannot plead performance of a condition precedent, and recover under proof of a waiver of such performance.''

In *Hannan v. Greenfield*, 36 Or. 97 (58 Pac. 888), it is said:

"It is a settled rule that proofs must follow the allegations of the complaint; thus an allegation that plaintiff had performed all of the conditions of a contract precedent to his right to sue will not support testimony that such conditions had not been performed because of a waiver by the other party."

Durkee v. Carr, 38 Or. 189 (63 Pac. 117), is authority for the following:

"The rules of the common law respecting the allegation of the performance of a condition precedent have been changed by our statute so as to permit a party to plead generally that he had duly performed all the conditions imposed upon him by his agreement: Hill's Ann. Laws [1892], § 87. But when he relies upon a waiver of such performance by the adverse party, he should aver that fact, so as to let in evidence thereof.

In *Carnahan Manufacturing Co. v. Beebe-Bowles Co.*, 80 Or. 124, 129, 131 (156 Pac. 584, 586), the opinion of Mr. Justice BURNETT in construing a complaint similar to that in the case at bar, says:

"That pleading up to that stage of the trial was to the effect that the plaintiff had fully and completely performed all of the terms of its engagement. It then proposed to make a radical change of front and say in substance: 'It is true that I did not meet all of the requirements of my stipulation, but it was not my fault.' * *

"The principle being established that the approval of the umpire is a condition precedent, it is necessary as a matter of pleading that the party show a compliance with the contract or a valid reason for a shortcoming in that particular. This he must do in his complaint, for it is his duty to state the whole truth respecting his grievance in the first pleading."

The opinion by Mr. Justice McCAMANT in *Mercer v. Germania Ins. Co.*, 88 Or. 410 (171 Pac. 412), holds that:

“In an action on a contract plaintiff must prove a right to prevail under the contract unless he alleges in his complaint a waiver on the part of the defendant of some of the provisions of the contract or an estoppel to assert them as a defense.”

Here, since the proof shows and plaintiff admits that neither of the contracts was completed within the time specified, and there is no allegation in the complaint of facts which would constitute a waiver or estoppel on the part of the city, it must follow that under the authorities cited the plaintiff was not entitled to recover upon a complaint based on specific performance.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and HARRIS, J., concur.

BENNETT, J., concurs in the result.

Submitted on briefs April 13, affirmed May 18, 1920.

ASTORIA v. ZINDORF.

(189 Pac. 884.)

Exceptions, Bill of—Transcript of Evidence must be Certified by Trial Judge.

1. A transcript of the evidence cannot be considered as a bill of exceptions, unless certified by the trial judge.

Appeal and Error—Only Sufficiency of Findings to Support Judgment Reviewable Without Bill of Exceptions.

2. In the absence of bill of exceptions, the appellate court can consider only whether the findings are sufficient to support the judgment.

From Multnomah: HARRY H. BELT, Judge.

In Banc.

This is an action at law, wherein the plaintiff seeks to recover for materials furnished to the defendant Zindorf as a contractor in the construction of a reservoir for the City of Astoria, and the Fidelity and Deposit Company of Maryland is joined as a defendant by reason of its having executed a bond, in compliance with the statute, conditioned, among other things, for the protection of those supplying materials for the structure. An answer and a reply were filed, joining issue upon material allegations, and there was a trial to the court without a jury, resulting in a judgment for plaintiff, from which the defendants appeal. AFFIRMED.

For appellants there was a brief prepared and submitted over the name of *Mr. O. B. Setters*.

For respondent there was a brief submitted by *Messrs. Wood, Montague & Matthiessen*.

BENSON, J.—The assignments of error challenge the accuracy of the findings of fact, and the conclusions deduced therefrom. Unfortunately for the appellants, there is no bill of exceptions in the record. There is what purports to be a transcript of the testimony taken upon the trial, but the only certification thereof is that of the official stenographer who reported the same. In the recent case of *Thomsen v. Giebisch*, ante, p. 118 (186 Pac. 10), this court has held that a transcript of the evidence cannot be considered as a bill of exceptions unless it be certified by the trial judge; hence the case is before us without any bill of exceptions.

This court has frequently held that in the absence of a bill of exceptions, the appellate court can consider only whether the findings are sufficient to support the judgment: *Lewis v. Clark*, 66 Or. 461 (134 Pac. 1194); *State v. Rider*, 78 Or. 318 (145 Pac. 1056, 152 Pac. 497); *Humphry v. Portland*, 79 Or. 430 (154 Pac. 897). Taking the findings of fact to be true, as we must in the state of the record as we find it, and having given them very careful consideration, we are compelled to say that they fully support the judgment, which is therefore affirmed.

AFFIRMED.

Mr. Justice BURNETT took no part in the consideration of this case.

Argued April 13, affirmed May 18, 1920.

COATES v. MARION COUNTY.

(189 Pac. 903.)

Death—Statute Makes County Liable for Death from Defective Highway Bridge; "Pari Materia."

1. Section 6375, L. O. L., giving right of action against county to one injured by defective highway or bridge thereon, being a legal county road, with the earlier statute, Section 380, giving right of action for death where, had the person lived, he might have maintained an action for injury done by the same wrongful act or omission, gives right of action for death from such a defective bridge; the statutes being in *pari materia*, that is, relating to the same thing or subject, though enacted at different times.

Bridges—Point of Accident, Relative to Liability of County, for Jury.

2. The question, relative to liability of county for death from a defect in a bridge, whether the point of the accident, not in dispute, was outside the corporate limits of a city, is for the jury on conflicting testimony, notwithstanding a civil engineer, who made a survey, testified on one side.

Bridges—Evidence of Other Accidents at Same Place Competent on Question of it Being Dangerous.

3. Evidence of other accidents having occurred at the same place on a highway bridge is competent on the question of the place being dangerous.

Evidence—That Auto has Current Number-plate Evidence of Compliance with Motor Vehicle Law.

4. The motor vehicle law providing for number-plate being attached to a car as evidence that the law has been complied with, evidence of a car being so equipped with a plate for the current year is admissible without other evidence of a license being issued.

Bridges—Repairing by County Officials Admissible to Show County, and not City, Liable.

5. On the disputed question of whether the point on a bridge where an accident occurred was within the corporate limits of a city, or in the other part of the county, as plaintiff contended, the conduct of the county officers in repairing it could be considered by the jury.

Trial—Requested Instruction not Based on Evidence Properly Refused.

6. A requested instruction that, if one when injured was traveling on the left side of the street, he was traveling unlawfully, is properly refused; there being no testimony on which to base it.

Trial—Refusal of Instructions Covered by Those Given Proper.

7. It is not error to refuse requested instructions which are fully covered by instructions given.

Evidence—Presumption That Law has Been Obeyed Prevents Nonsuit and Directed Verdict.

8. The statutory disputable presumption, declared by Section 799, subdivision 34, L. O. L., that the law has been obeyed, is, by provision of Section 793, evidence, and so prevents nonsuit and directed verdict.

From Linn: PERCY R. KELLY, Judge.

Department 1.

Plaintiff is the administratrix of the estate of F. L. Coates, deceased, who died from the effect of injuries received in an accident occurring at a bridge near the northern boundary of the town of Jefferson, in Marion County. He was riding in an automobile which, upon entering the bridge, swerved to one side, broke through the guard-rail, and fell into the ravine below. It is alleged that the bridge is upon and part of a legally established county road

known as the "Pacific Highway," and that the accident was caused by the negligence of the defendant. The specific acts of negligence charged are: (a) That defendant had permitted it to become badly cut up with ruts and depressions making it unsafe for travel; (b) that the bridge was permitted to fall into a condition of decay, and had a false decking formed by laying timbers lengthwise thereon for a width of 8 feet and a length of 85 feet, leaving the under-decking exposed for a distance of 4 feet on each side, and so placed that the false decking was 3 inches higher than the exposed under-decking, and therefore unsafe; (c) that the road is 60 feet wide, and the bridge 16 feet wide, and not in line with the regularly traveled track of the highway, and without safe guard-rails on the sides; (d) that the bridge was from 3 to 6 feet below the grade of the roadway leading thereto, so that a person approaching the bridge in a motor-car, at a reasonable speed, is unable to discover the ruts and the defects in the bridge before coming in contact with them; (e) that at a point adjacent to the bridge at the south approach thereof, there was a rut 12 inches deep extending entirely across the road. The deceased, while driving a motor vehicle on the road described ran the same into this rut, and against the "up-raise" caused by the false decking on the bridge, which threw the car out of its course, and caused it to plunge through the side-rail, into the ravine below, injuring the decedent so that he died within a day or two thereafter.

Defendant answered, denying the material allegations of the complaint, and there was a trial, resulting in a verdict and judgment for plaintiff from which defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Max Gehlhar*, District Attorney, and *Mr. James G. Heltzel*, Deputy District Attorney, with an oral argument by *Mr. Gehlhar*.

For respondent there was a brief over the name of *Messrs. Weatherford & Wyatt*, with an oral argument by *Mr. J. R. Wyatt*.

BENSON, J.—1. At the beginning of the trial, the defendant objected to the admission of any evidence in support of plaintiff's case upon the ground that in this state no right of action exists upon a state of facts such as are set out in the complaint. Defendant argues that no action can be maintained against a county under such circumstances, unless expressly permitted by statute; a doctrine which is justified by the holding of this court in *Templeton v. Linn County*, 22 Or. 313 (29 Pac. 795, 15 L. R. A. 730). Shortly after that decision was handed down, the legislature, in 1893, passed an act which is now Section 6375, L. O. L., which reads as follows:

“Whenever any individual, while lawfully traveling upon any highway of this state or bridge upon such highway, the same being a legal county road, shall, without contributory negligence on his part, and without knowledge upon his part of the defect or danger, sustain any loss, damage, or injury in consequence of the defective and dangerous character of such highway or bridge, either to his person or property, he shall be entitled to recover of the county in which such loss, damage, or injury occurred, compensatory damages, not to exceed the sum of \$2,000 in any case by an action in the Circuit Court of such county, or in a Justice's Court therein, if the amount of damages sued for shall not exceed the sum of \$250.”

It is argued that statutes of this character are to be strictly construed, and that, since the act expressly provides only for a recovery by the party injured, and is silent upon the subject of the recovery of damages for the death of a person, this action cannot be maintained thereunder. It must be conceded that if we were confined exclusively to the statute quoted for a right of action such contention would necessarily prevail. However, the plaintiff directs our attention to Section 380, L. O. L., which contains the following language:

“When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission.”

This law was enacted in 1862, and had never been repealed. Plaintiff urges that the two acts are in *pari materia* and must be construed together. In the consideration of this question, it may be observed that the two sections are not in any way conflicting or inconsistent, and therefore, the subject of a repeal by implication is not involved. Are the two statutes in *pari materia*? In *United Society v. Eagle Bank*, 7 Conn. 456, 468, such laws are defined thus:

“Statutes are in *pari materia*, which relate to the same person or thing, or to the same class of persons or things. The word ‘*par*’ must not be confounded with the term ‘*similis*.’ It is used in opposition to it, as in the expression ‘*magis pares sunt quam similes*,’ intimating not likeness merely, but identity. It is a phrase applicable to the public statutes or general laws, made at different times, and in reference to the same subject.

"All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also in connection with other statutes on the same subject": 36 Cyc. 1146.

"Statutes which relate to the same thing or to the same subject are in *pari materia*, although they were enacted at different times": 25 R. C. L. 1067.

With these legal principles in mind, let us consider the statutes here involved. The earlier one provided that if the decedent, surviving an accident, would have had a right of action for injuries resulting from the negligence of another, his personal representatives may maintain an action for the death brought about by the same act of negligence. Later, with this statute in mind, the legislature enacted Section 6375, which expressly gives the injured party a right of action against a county for injuries resulting from a defective highway, and thus brings a death, resulting from such injuries, within the purview of Section 380. We conclude, therefore, that defendant's position is not well taken, and was properly disregarded by the trial court.

2. Assignments of error numbered 4 and 5 challenge the correctness of a ruling "admitting evidence of the defective and dangerous condition of a street within the corporate limits of the City of Jefferson," and showing that defendant exercised acts of control over the same. These assignments are based upon the assumption that the uncontradicted evidence established the fact that the scene of the accident and injury lay entirely within the cor-

porate limits of Jefferson. There is no controversy as to where the accident occurred, the record disclosing that it happened at the south end of the bridge, and it being the theory of plaintiff that it was caused by the concurrence of the facts that the bridge was not in line with the roadway, that there was a rut or depression in the road at the point where it joins the bridge, and that the "half-soling" of the bridge at that point was defective. The chief dispute arose as to whether the location of these alleged defects was within the corporate limits of the City of Jefferson. The county surveyor testified that he had made a survey of the northern boundary of the city, which showed such line to include 2 feet of the length of the bridge at the south end. Other witnesses, however, testified that the northern boundary of the city was a few feet south of the end of the bridge, and that all of the defects were in a public county road known as the Pacific Highway. While it may be true that the testimony of a civil engineer who has made a survey of the line should be accorded great weight, our attention has not been called to any law which makes such testimony conclusive, and after all, it was a question properly submitted to the jury.

3. Defendant next complains because the court admitted evidence of other accidents occurring at the same place. Such evidence was admitted over the objection of defendant, but in doing so, the trial court expressly limited its application to showing that the place was dangerous. There are a few jurisdictions in which such evidence is held to be incompetent for that purpose, but this court has definitely held that it is competent: *Galvin v. Brown*

& McCabe, 53 Or. 598 (101 Pac. 671); *Gynther v. Brown & McCabe*, 67 Or. 310 (134 Pac. 1186).

4. It also urged that it was error to admit evidence that the car was properly equipped with license tags of the current year, without first showing that a license had been issued by the Secretary of State. We find no merit in this connection. If the motor-vehicle law provided for the issue of some form of license other than the number-plates, which, so far as we have been able to discover, it does not, still the statute provides for such number-plates to be attached to the car as evidence that the law has been obeyed, and such evidence was properly admitted.

5. We come now to a consideration of the assignments of error based upon instructions which were either given or refused by the trial court. Among others, the following charge was given to the jury:

“There has been some evidence tending to show that repairs were made subsequent to the alleged injury herein upon the bridge in question. This evidence is not material to the question of the alleged existence of a defective or dangerous condition of the highway at the time of the alleged injury, but is pertinent only to the question of who had control thereof, and should be thus restricted by you.”

Defendant argues that this instruction is erroneous for the reason that if, in fact, it was not a legal county road, but was within the jurisdiction of Jefferson, the circumstance of exercising control thereof would not render the county liable. This is true, and the paragraph of which complaint is made, does not advise the jury otherwise. It must be remembered that there is a sharp conflict as to whether or not the defects were within the corporate limits of the town, and the conduct of the county officers in

relation thereto is a circumstance which the jury might properly consider in determining the exact location of the spot where the accident occurred.

6. Defendant's requested instruction No. 4, which was refused, reads thus:

"I instruct you further, as a matter of law, that it was the duty of the deceased to travel on the right half of the road, street or bridge. If you find that the deceased was traveling or attempting to travel on the left half of the bridge, or was attempting to cross from the right half of the bridge to the left half of the bridge, then he was not lawfully traveling on the highway, and cannot recover anything. It is immaterial whether such crossing or attempting to cross to the left half of the bridge, if you find that he did so cross or attempt to cross, contributed to the injury or not. He was, under such circumstances, not traveling lawfully, and under the laws of this state the county is not liable if injury resulted."

We have examined the evidence carefully and have been unable to find any testimony in the record upon which to base such an instruction, and it was therefore properly refused: *Bowen v. Clarke*, 22 Or. 566 (30 Pac. 430, 29 Am. St. Rep. 625).

7. Defendant's requested instruction No. 5, which was refused, relates to that part of the motor-vehicle law requiring cars to be driven at a reasonable rate of speed, never exceeding 25 miles per hour. It was not error to refuse this instruction, since it is fully covered by an instruction which the court gave.

The same may be said regarding requested instructions Nos. 7 and 11, the refusal of which is assigned as error.

8. Upon the trial the defendant interposed seasonable motions for a judgment of nonsuit and for a directed verdict, the denial of which is assigned as error. All of the grounds upon which such motions

were based are involved in the assignments already discussed, except that it is further urged that there is a failure of proof to sustain the contention that plaintiff's intestate was lawfully traveling upon the highway at the time of the accident. In other words, it is contended that plaintiff has not shown that decedent had fully complied with the requirements of the motor-vehicle law. One of the statutory disputable presumptions is, that the law has been obeyed (Section 799, subd. 34, L. O. L.), and such presumption is evidence: Section 739, L. O. L.

The motions for a judgment of nonsuit and for a directed verdict were properly denied.

We find no substantial error in the record, and the judgment is affirmed. **AFFIRMED.**

McBRIDE, C. J., and HARRIS and BURNETT, JJ.,
concur.

Argued April 14, reversed and remanded May 25, 1920.

SCHNITZER v. STEIN.

(189 Pac. 984.)

**Jury—Defendant Entitled to Jury Trial on Appeal to Circuit Court
Notwithstanding Small Amount Involved.**

1. On an appeal to the Circuit Court from the District Court, defendant was entitled to a jury trial under Article I, Section 17, and Article VII, Section 3, of the Constitution, though the controversy involved only \$37.50.

**Jury—Right to Jury Trial may be Regulated by Statute Within Cer-
tain Limits.**

2. The exercise of the constitutional right of trial by jury may within well-defined limitations be regulated by statute.

Courts—Rules cannot Regulate Matter Regulated by Statute.

3. Where the courts exercise the power of making rules, whether such power is conferred by statute or deemed to exist in the absence

of statute, they cannot by mere rule of court regulate a matter already regulated by statute.

Courts—Rule Requiring Payment of Jury Fee Before Trial Held to Violate Statute.

4. Assuming that under Section 916, L. O. L., the Circuit Court, in the absence of statute, can by rule require the payment of the jury fee four days before the cause is called to be set for trial under penalty of losing the right to a jury trial, such a rule violates Section 1117, L. O. L., as amended by Laws of 1915, page 91, requiring the clerk to collect such fee at the time the action, suit, or proceeding comes on for trial by jury, especially as the amendment eliminated a provision for payment two or four days before the case was called.

Courts—Rules must Yield to Statute.

5. When a rule of court conflicts with the statute, it must yield to the statute.

[As to the validity of a court rule in contravention of common law or statute, see the note in 19 Ann. Cas. 801.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

The plaintiffs, S. Schnitzer and H. J. Wolf, partners doing business as the Alaska Junk Company, brought this action in the District Court for Multnomah County against S. Stein and M. Baumstein for the recovery of \$37.50 with interest from April 12, 1917. S. Stein alone answered. The trial in the District Court resulted in a judgment for the plaintiffs for the amount demanded in the complaint, and from that judgment Stein appealed to the Circuit Court.

When the cause came on for trial on February 11, 1919, the circuit judge was "advised of the nature of the case, the amount involved, and that the defendant S. Stein desired a jury trial." The bill of exceptions recites that "the court refused to permit a jury to be called in this case, for the reason it is an appealed case from the District Court where a jury is had, and it is too trifling to justify a jury being called at the expense of the county." After

"the court announced that no jury would be allowed," Stein "deposited \$12 jury fee" with the clerk, and he again demanded a trial by jury. The court again refused to impanel a jury, and, in addition to the reason previously given, said:

"Under the rules you are not entitled to a jury, anyway. According to the rules, you have to pay the jury fee four days before trial."

The rule to which the circuit judge referred is Rule 4 of the rules of the Circuit Court for Multnomah County. Rule 4 reads as follows:

"In all actions and appeal cases, including those from the municipal court involving the violation of a city ordinance, wherein the parties may be entitled to trial by jury, the clerk shall, at least four days before the cause is called to be set for trial, collect from the plaintiff or appellant the jury trial fee, unless the plaintiff or appellant shall have filed a statement in writing entitled in the cause to the effect that a jury trial is waived. If the plaintiff or appellant shall have filed a waiver or shall have refused or neglected to pay the jury trial fee as above mentioned, the clerk shall at least two days before the cause is called to be set for trial, collect from the defendant or respondent the jury trial fee, unless the defendant or respondent shall have filed a statement in writing entitled in the cause to the effect that a trial by jury is waived. Cases wherein the jury trial fee has not been paid, as above provided, shall be tried by the court without a jury, unless the court shall otherwise order. No order to return the jury trial fee shall be made after a case has been set for trial and continued. The jury trial fee shall not be exacted in criminal actions."

The circuit judge proceeded to try the action without the intervention of a jury, and after hearing the evidence offered by the plaintiffs, the defendant Stein declining to offer any evidence, the

court rendered a judgment for the plaintiffs, and Stein appealed. REVERSED AND REMANDED.

For appellants there was a brief and an oral argument by *Mr. Morris A. Goldstein*.

For respondents there was a brief and an oral argument by *Mr. S. J. Silverman*.

HARRIS, J.—1. When the appealing defendant entered the Circuit Court, the Constitution guaranteed him the right of trial by jury; and that right was nowise impaired, weakened or diminished by the fact that the controversy involved only \$37.50. Article I, Section 17, and Article VII, Section 3, Constitution of Oregon: *Puffer v. American Ins. Co.*, 48 Or. 475, 478 (87 Pac. 523).

2, 3. The exercise of the right of trial by jury may, within well-defined limitations, be regulated by statute; as, for example, a litigant may be required not only to pay a fee, but also to pay the fee in advance; or he may be required to demand a jury at a certain time. It has been generally held that courts possess an inherent power to prescribe such rules, in relation to the details of business, as shall best serve the purpose of methodically disposing of cases brought before them, subject, of course, to organic and statutory laws: *Carney v. Barrett*, 4 Or. 171, 175; *Coyote G. & S. M. Co. v. Ruble*, 9 Or. 121, 125; *State v. Birchard*, 35 Or. 484, 486 (59 Pac. 468); *Zeuske v. Zeuske*, 55 Or. 65, 88 (103 Pac. 648, 105 Pac. 249, Ann. Cas. 1912A, 557); *Francis v. Mutual Life Ins. Co.*, 61 Or. 141, 143 (114 Pac. 921); 7 R. C. L. 1023. The judges of the Circuit Court for Multnomah County are by statute empowered to make “all needful rules and regulations, not incon-

sistent with law, to effectuate the object of this act and facilitate the transaction of business": Section 916, L. O. L. When courts exercise the power of making rules, whether such power is conferred by statute, or is deemed to exist in the absence of statute, they cannot by a mere rule of court regulate a matter which is already regulated by statute: 15 C. J. 904. It is not necessary to determine whether the modes of waiver of jury trial specified in Section 157, L. O. L., are exclusive of all other modes, or whether Circuit Courts cannot, because of Section 157, L. O. L., by rule declare that a failure to pay the jury trial fee a given number of days in advance shall operate as a waiver; but, for the purposes of this discussion only, it may be assumed, without deciding, that courts can, in the absence of a statute regulating the matter, publish and enforce a rule requiring the payment of the statutory jury fee "four days before the cause is called to be set for trial": See, *American Mortgage Co. v. Hutchinson*, 19 Or. 334, 340 (24 Pac. 515); *Wilkes v. Cornelius*, 21 Or. 341, 345 (23 Pac. 473); *Johnston v. Schofner*, 23 Or. 111, 116 (31 Pac. 254); *In re McCormick's Estate*, 72 Or. 608, 624 (143 Pac. 915, 144 Pac. 425); *People v. Metropolitan Surety Co.*, 164 Cal. 174 (128 Pac. 324, Ann. Cas. 1914B, 1181); *Lipscomb v. Condon*, 56 W. Va. 416 (49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670); *Conneau v. Geis*, 73 Cal. 176 (14 Pac. 580, 2 Am. St. Rep. 785). An examination of the statute now in force, when considered in the light of previous legislation, will demonstrate that Rule 4 of the Circuit Court for Multnomah County conflicts with the statute.

4. In 1903 the legislature passed an act "to establish and regulate the fees to be collected in all

counties of the state containing more than fifty thousand inhabitants. * * "; and Section 2, subd. 39, of that act was carried into Lord's Oregon Laws as Section 1117, and it reads as follows:

"The jury trial fee is \$12, to be collected at the time and in the manner following: In all actions and appeal cases wherein the parties may be entitled to a trial by jury, the clerk shall, at least four days before the cause is called to be set for trial, collect from the plaintiff or appellant the jury trial fee, unless the plaintiff or appellant shall have filed a statement in writing entitled in the cause to the effect that a trial jury is waived. If the plaintiff or appellant shall have filed a waiver, or shall have refused or neglected to pay the jury trial fee, as above mentioned, the clerk shall, at least two days before the cause is called to be set for trial, collect from the defendant or respondent the jury trial fee, unless the defendant or respondent shall have filed a statement in writing entitled in the cause to the effect that a trial by jury is waived. Cases wherein the jury trial fee has not been paid, as above provided, shall be tried by the court without a jury, unless the court shall otherwise order. If a case wherein the jury trial fee has not been paid, is tried by a jury by order of court, it shall be the duty of the clerk to tax against the losing party as costs, to be collected for the benefit of the county the sum of \$12. The court may, if the order is made ten days before the date set for trial thereof, provide, in disposing of a case settled or dismissed, that the party who advanced the jury trial fee is entitled thereto, and such recital shall be sufficient authority for repayment thereof by the clerk. No order to return the jury trial fee shall be made after a case has been set for trial and continued. The trial fee of \$6.00 above provided, shall not be exacted in any case wherein a jury trial has been paid by either party and not refunded. The jury trial fee shall be collected for each trial of the case by a jury, and as above provided. The trial fee herein provided shall

be deemed disbursements, and may be taxed and collected as other costs and disbursements by the prevailing party. The jury trial fee shall not be exacted in criminal actions."

In 1915 the legislature amended Section 1117, L. O. L., by enacting Chapter 83, Laws of 1915. The amendatory act, so far as it is material here, reads as follows:

"The jury trial fee is \$12, to be collected at the time and in the manner following: The clerk shall collect from the plaintiff or appellant, at the time such action, suit or proceedings come on for trial by a jury, a jury trial fee. If the plaintiff or appellant shall waive a trial by jury, and the defendant or respondent desires a trial by jury the clerk shall collect from the defendant or respondent the jury trial fee. Cases wherein the jury trial fee has not been paid, as above provided, shall be tried by the court without a jury, unless the court shall otherwise order. * * ,"

By the terms of Section 1117, L. O. L., as it originally read, the clerk was required, "at least four days before the cause is called to be set for trial," to collect from the plaintiff or appellant the jury trial fee; and if the plaintiff or appellant had filed a waiver, or neglected to pay the fee, the clerk was required "at least two days before the cause is called to be set for trial" to collect from the defendant or respondent the jury trial fee, unless he has filed a statement waiving a trial by jury. But by the amendatory act the legislature has required the clerk "to collect from the plaintiff or appellant, at the time such action, suit or proceedings come on for trial by a jury" the jury trial fee; or, if the plaintiff or appellant waives a trial by jury, the clerk shall collect the fee from defendant or respondent,

unless he also waives his right of trial by jury. The legislature in effect said in 1903 that the jury trial fee must be collected a given number of days in advance; but in 1915 the legislature changed its orders, and said that the jury trial fee need not be paid in advance, and that it is sufficient if the fee is paid "at the time" the action comes on for trial. The outstanding and most prominent feature of the amendment is the change in the time for the payment of the fee; and, indeed, this change of time is of the very essence of the amendatory act.

5. A comparison of Section 1117, L. O. L., as originally enacted, with Rule 4, will disclose that, so far as concerns the time for paying the jury trial fee, Rule 4 is a transcript of Section 1117. In other words, the court has attempted, by Rule 4, to require to be done that which the legislature has, by statute, declared need not be done. The rule conflicts with the statute, and, therefore, the rule must yield to the statute: *Nichols v. Cherry*, 22 Utah, 1 (60 Pac. 1103).

The defendant Stein paid the fee at the time required by law, and he was entitled to a trial by jury. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and BURNETT, JJ.,
concur.

Argued April 8, affirmed May 25, 1920

GEARIN v. ROTHCHILD BROS.

(189 Pac. 992.)

**Landlord and Tenant—Tenant Forfeiting Lease and Improvements
Liable for Rent.**

1. A tenant leasing and improving property *held* liable for rent due at time of forfeiture by reason of failure to pay rent, the lease providing that the lessor could terminate for such reason "without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant," and that improvements became the property of lessor immediately upon construction.

From Multnomah: ROBERT TUCKER, Judge.

See, also, 88 Or. 403 (170 Pac. 923).

Department 2.

On October 5, 1906, the plaintiff leased to the defendant for a period of 23 years from April 1, 1907, lot 4 in block 64 of the City of Portland, whereby the defendant covenanted and agreed to pay the plaintiff a monthly rental of \$1,200 for the first 21 years of the lease, and \$1,450 monthly for the remaining 2 years. The complaint alleges that the defendant failed, neglected and refused to pay rental for the months of May and June, 1916, or any part thereof; and that there is now due and owing \$2,400 on account of such lease, for which amount the plaintiff asks judgment. Attached to the complaint is a copy of the lease, the material portions of which are as follows:

"That in consideration of the covenants and agreements hereinafter contained on the part of the said lessee to be by it done, kept and performed, the said lessor for herself, her heirs, executors, administrators and assigns, does hereby lease"

—the property above described; that the defendant

should pay the stipulated rental in advance, and in addition thereto all taxes, street and sewer assessments and any charge levied against the property or the ownership thereof during the period of the lease; that if the lessee should proceed at once after April 1, 1907, to remove the old buildings on the premises and actually to construct a new one, the stipulated rent should be remitted for the months of July, August and September, 1907, and that:

“It is further expressly contracted and agreed by and between the parties hereto that as soon as convenient after the said first day of April, A. D. 1907, the said lessee shall erect upon said property a building costing not less than eighty-five thousand dollars (\$85,000.00), and to be not less than seven (7) stories high, with suitable basement, and to be erected and constructed in accordance with the requirements of the ordinances of the City of Portland; said building to be completed within one (1) year from said first day of April, A. D. 1907.”

Should the lessee fail to erect and pay for the structure within one year from April 1, 1907, it should forfeit to the lessor as stipulated damages the sum of \$50,000, but the lease provided that if it should in good faith commence and prosecute the construction of the building, and be delayed by strikes or similar causes beyond its control, such penalty would not be enforced. The instrument further recites:

“It is mutually understood and agreed that the ownership of all buildings and improvements put upon the said premises is to vest in the said lessor immediately, as soon as the same are constructed, subject, however, to the provisions of this lease”; and that:

"The liability of the lessee for breach of any of the covenants or agreements herein provided shall be limited to forfeiture of this lease and all of the improvements, save and except such additional penalties as are provided for failure to build and insure, as hereinbefore provided."

It was further provided that, should the lessee fail or neglect to keep or perform any of the terms or conditions of the lease by it to be fulfilled, the lease and all rights thereunder should be forfeited; that the lessor should be entitled to take possession of the property; that "all interest therein and title thereto of the said lessee shall at once forfeit and vest in said lessor"; that without further notice or demand the latter might enter and expel the said lessee "without being taken or deemed guilty in any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant"; and that at the end of the lease or the prior termination thereof the lessee should "quit and deliver up the premises and all the future erections, buildings, additions or improvements thereon or thereto." Provision was also made that the defendant should insure the building, to whom the loss, if any, should be paid, and for a reconstruction at the option of the lessee, in the event of a total loss.

The defendant admits the making of the lease, and the failure to pay the rent as alleged, but denies that there was anything due or owing, and for a first affirmative defense avers that it constructed a building upon the lot in question, at a cost of \$140,000, and insured it as required by the agreement; that during the month of March, 1916, and continuously thereafter to October 27th of that year, the defendant

failed to pay the rent, and on the later date the plaintiff elected to terminate the lease and repossess herself of the property together with the improvements placed thereon by the defendant, and then commenced an action of forcible entry and detainer in the Circuit Court for Multnomah County, wherein she recovered judgment for the restitution of the premises, upon which execution was issued about December 2, 1916; that she then terminated the lease and evicted the defendant from the premises, took possession thereof and of the improvements thereon, and penalized the defendant without any accounting or compensation; that since that date the plaintiff has been and now is in possession of the said realty and the improvements thereon; and that in accord with the terms of the lease she has availed herself to the limit of defendant's liability for any breach and is not entitled to recover further. The second affirmative defense is an equitable plea alleging that the defendant had expended \$140,000 for improvements on the property; that by reason of the plaintiff's bringing her action of forfeiture and evicting the defendant, the latter was entitled to have the value of its improvements "considered as a fund for the security of whatever might be due under the lease, and out of all proportion to the amount due, and entitling the defendant to an accounting"; that it would be "unjust and inequitable to declare a forfeiture of property of such great value as a penalty, and that the rights of the parties can only be fairly established through an accounting between them to determine the amount of setoffs due the plaintiff under any breach of the covenants and agreements of the lease." The defendant prays for an accounting.

To such pleas the plaintiff filed a demurrer "for the reason that the same do not state facts sufficient to constitute a defense." This was sustained, and as the defendant refused to plead further, judgment was entered in favor of the plaintiff for the full amount of the accrued rental. The defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Bernstein & Cohen*, with an oral argument by *Mr. Alex Bernstein*.

For respondent there was a brief over the names of *Mr. Martin L. Pipes*, *Mr. Hugh C. Gearin*, *Mr. John M. Pipes* and *Mr. George A. Pipes*, with oral arguments by *Mr. Martin L. Pipes* and *Mr. Gearin*.

JOHNS, J.—1. The lease now before this court is the identical instrument upon which the action was brought in the case of *Gearin v. Rothchild*, 88 Or. 403 (170 Pac. 923), is between the same parties and concerns the same property. Both cases are for arrears of rent prior to forfeiture, and the causes of action are identical in form, differing only as to the months' rental for which recovery is sought. The earlier litigation was for arrears of rent for half the month of March and the month of April, 1916, and the instant action is to recover rent for the months of May, June, July and August of the same year. In the former case, as in the present, there was no forfeiture or surrender at the time the action was commenced. There, this court held the defendant liable for arrears of rent then accrued. Here, the defense is based solely upon the fact that after the rent became due and the cause of action had arisen, and before this litigation was commenced, the plain-

tiff brought her action for forcible entry and detainer and through judgment of eviction obtained possession of the property; and it is contended that after she had so obtained possession by eviction she could not recover for the prior rental which had accrued.

The plaintiff was the owner of the property and made the lease to the defendant "in consideration of the covenants and agreements hereinafter contained, on the part of the said lessee to be by it done, kept and performed." The covenants "hereinafter contained" are the promises to construct a building on the property at a cost of not less than \$85,000, to pay the taxes, insurance and assessments against the premises, and to pay the stipulated rental during the life of the lease. All of these provisions entered into and were a part of the consideration for the making of the lease.

That instrument expressly provides that the ownership of all buildings or improvements placed upon the premises "shall vest in the lessor immediately after the same are constructed." Although it is true that the lease recites that, in case of total destruction of the building by fire, the lessee may abandon the lease, and that by delivery to the lessor of her proportionate share of the insurance "the lease shall terminate," no such event occurred; and there is no claim that the lessee surrendered or abandoned the lease. It is alleged and admitted that the rent was not paid; that for such reason the defendant was evicted; and that the lease was terminated by the lessor. This she had a legal right to do. The instrument further provides that such action on her part shall be "without prejudice to any remedies which might otherwise be used for

arrears of rent or preceding breach of covenant." When the defendant constructed the building, it legally knew that, by the terms of the agreement, the same would become the property of the plaintiff, and it also knew that this was one of the considerations upon which it was to have the use and occupation of the property upon paying the stipulated monthly rental in money; that, if such cash rental should be in arrears for ten days, the plaintiff at her option could terminate the lease; that, when it was so terminated, the agreement and all rights thereunder should be at an end and the plaintiff would be entitled to the property; and that such termination and possession would be without prejudice to any remedy which she might otherwise have for collecting arrears of rent. There is no merit in the defense. The judgment is affirmed. **AFFIRMED.**

McBRIDE, C. J., and BEAN and BENNETT, JJ.,
concur.

Argued before Department 2, November 13, 1919, reargued in Banc
March 25, reversed and remanded May 25, 1920.

HERRICK v. BARZEE.

(190 Pac. 141.)

Contracts—Attorney may Appear Before Legislative Body to Procure Appropriation.

1. A contract for services to be rendered by an attorney before a legislature, or the Congress of the United States, in securing the passage of a law providing for the payment of a just claim, is not unlawful and not against public policy, if it does not contemplate the use of improper means and if the services to be rendered are such as appeal to the reason of those whom it is sought to persuade.

Courts—Federal Decisions Followed in Determining Validity of Contract Affecting Federal Legislation.

2. In determining whether or not a contract for services to be rendered by an attorney before the Congress of the United States in

securing the passage of a law is against public policy, decisions of the federal courts should be taken as a guide; federal legislation being concerned.

Contracts—Advice of Attorney to Petition Legislators Did not Render Contract to Procure Passage of Law Unlawful.

3. A contract for services to be rendered by an attorney before Congress in securing the passage of a law providing for the payment of a just claim was not rendered unlawful or contrary to public policy because it was attempted to be carried out in part by the claimants writing to the senators and representatives in Congress, upon the advice of the attorney; the United States Constitution securing to the people the right to petition the government for a redress of grievances.

Contracts—Services of Attorney Under Contract to Procure Legislation Legalized by Provision.

4. A provision attached to an act of Congress appropriating money to pay claimants, providing that no agent or attorney should receive more than 5 per cent thereof for his services, legalized a contract between the claimants and an attorney agreeing to secure an appropriation to the claimants.

Attorney and Client—Provision Fixing Compensation Attached to Appropriation to Pay Claim Supersedes Express Contract for Compensation.

5. Where Congress in appropriating a certain amount to pay certain claimants named in the act attached a proviso to the effect that no attorney representing a claimant should receive more than 5 per cent as compensation, such proviso superseded any express contract between attorney and claimants.

Trial—Differences in Inferences from Evidence for Jury; Motion for Nonsuit Admits Truth of Evidence; "Demurrer to Evidence."

6. A motion to nonsuit is a "demurrer to the evidence" and admits the truth of the evidence and every reasonable inference of fact which the jury may infer from it, and, if different conclusions can be drawn from the facts, the case should be left with the jury.

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc.

This is an action to recover \$380 for services of plaintiff, as an attorney for the defendant, in prosecuting a claim of the defendant against the United States for \$1,900 before Congress and its committees, and securing an act of Congress reimbursing defendant in such sum for the loss of land in the "overlap" in Sherman County, Oregon.

Plaintiff alleges that he entered into a contract with the defendant in 1907, or 1908, to secure an appropriation to reimburse the defendant for the loss of his land, and that he was to receive 20 per cent of the amount collected.

The defendant alleges that he entered into the contract with the plaintiff in 1901, or 1902, and that the money was to be secured by 1907, or the contract then ceased.

The cause was tried before the court and a jury, and at the close of the plaintiff's case in chief, the defendant moved for a judgment of involuntary nonsuit upon the grounds that the contract and the manner of its performance were contrary to public policy, and also for the reason that plaintiff was to receive a contingent commission. The nonsuit was granted and plaintiff appeals.

The original contract was not introduced in evidence. A form of contract, which plaintiff states, was, in substance, the same as the one executed, shows that—

“The defendant employed the plaintiff to prosecute before the Interior Department, the Congress of the United States, and if necessary, the United States Court of Claims, his claim against the Government for damages to him by reason of the opening to settlement of certain lands within the limits of The Dalles Military Road Grant, in the State of Oregon, including damages by reason of the loss of the use of the land and of the improvements for a number of years. In consideration for the said second party's professional services on this claim, the first party agrees to pay said second party the sum of 20 per cent of the amount recovered from the Government.”

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. J. B. Ofner* and *Mr. Charles J. Schnabel*, with an oral argument by *Mr. Ofner*.

For respondent there was a brief over the names of *Mr. Andrew M. Crawford* and *Mr. C. L. Barzee*, with an oral argument by *Mr. Crawford*.

BEAN, J.—The defendant contends that the contract in question is a lobbying contract and therefore void. The testimony tended to show the following facts: On May 9, 1896, defendant made a timber and stone entry at The Dalles, Oregon, land office on the S. $\frac{1}{2}$, SW. $\frac{1}{4}$, Sec. 21, Tp. 1 N., R. 17 E., W. M., in Sherman County, Oregon. The land office records disclosed that the land was subject to entry. The defendant took possession of the tract and made improvements thereon reasonably worth \$1,900. Subsequently it was discovered that said land, having been granted to The Dalles Military Road, was not subject to such entry, and on June 11, 1901, Barzee's entry was canceled, as a result of which the latter lost the value of his improvements and was thereby damaged in the sum of \$1,900.

It is admitted that the defendant had a just claim against the United States for \$1,900; that the plaintiff, Herrick, was employed to prosecute the claim before the proper tribunals for a compensation; that the claim was allowed by Congress on August 11, 1916, and defendant received payment of his claim. There is a conflict in the evidence as to the date of the execution of the contract and also as to the time of its termination and several other matters. In referring to the facts, it is not the intention to express any opinion in regard thereto, but only to

mention those which the testimony tended in a measure to prove.

Plaintiff's evidence indicated that he had been an attorney in Washington, D. C., since 1901; that he continued to serve defendant in the matter from the time the contract of employment was made, about 1909, until after the claim was paid in 1916; that he obtained data in regard to the claim of defendant and 67 other similar claims and prepared two or three different bills which were introduced and passed the United States Senate but failed to pass the House of Representatives; that he worked in the preparation of memoranda used before a committee, and appeared as attorney for claimant before a committee and made argument in favor of the claims before the Interior Department and the General Land Office, to which the bill was referred, and was recognized as attorney for Barzee; that in August 1916, the bill allowing the claims was passed by both branches of Congress, and defendant received the amount of his claim, \$1,900. As above stated, we do not pass on the sufficiency of this testimony.

1. The rule of law appears to be that any person whose interests may be in any way affected by any public or private act of a legislative body has an undoubted right to present and urge his claims by arguments, either in person or by counsel professing to act for him, before legislative committees. A contract for services to be rendered by an attorney before the legislature or the Congress of the United States, in securing the passage of a law providing for the payment of a just claim, is not unlawful if it does not contemplate the use of improper means and if the services to be rendered are such as appeal

to the reason of those whom it is sought to persuade. Drafting the petition to set forth the claim, collecting facts, preparing and submitting arguments either orally or in writing to a committee or other proper authority, and other services of like character, are within the category of professional services. They rest on the same principle of ethics as professional services rendered in a court of justice and are no more exceptionable. Services of such nature are separated by a broad line of demarcation from personal solicitation and similar means and appliances: 6 R. C. L., p. 734, § 139; 13 C. J., p. 432, § 368; 15 Am. & Eng. Ency. of Law (2 ed.) 970; *Hyland v. Oregon Hassam Paving Co.*, 74 Or. 1-11 (144 Pac. 1160, Ann. Cas. 1016E, 941, L. R. A. 1915C, 823); *Stanton v. Embrey*, 93 U. S. 549 (23 L. Ed. 983); *Nutt v. Knut*, 200 U. S. 12 (50 L. Ed. 348, 26 Sup. Ct. Rep. 216, see, also, Rose's U. S. Notes).

A valid distinction is made between lobbying services in procuring the passage of legislation and strictly legitimate professional services of an attorney directed to that end, it being held that a contract for contingent compensation for services of the latter kind is legal and enforceable: *Stroemer v. Van Orsdel*, 74 Neb. 132 (103 N. W. 1053, 107 N. W. 125, 121 Am. St. Rep. 713, 4 L. R. A. (N. S.) 212); see note, 6 Am. Eng. Ann. Cas. 219; *Chesebrough v. Conover*, 140 N. Y. 382 (35 N. E. 633); *Davis v. Commonwealth*, 164 Mass. 241 (41 N. E. 292, 30 L. R. A. 743); *McBratney v. Chandler*, 22 Kan. 692 (31 Am. Rep. 213).

If Barzee had a just claim against the United States, he had a right to employ an attorney to render proper professional services. The attorney may

receive a compensation consisting of a contingent fee, even where the services are to be performed before Congress. Such a case comes within the well-recognized exceptions to the general rule: *Wright v. Tebbitts*, 91 U. S. 252 (23 L. Ed. 320); *Stanton v. Embrey*, 93 U. S. 549 (23 L. Ed. 983); *Taylor v. Bemiss*, 110 U. S. 42 (28 L. Ed. 64, 3 Sup. Ct. Rep. 441); *Brown v. Brown*, 34 Barb. (N. Y.) 533; *Nutt v. Knut*, 200 U. S. 12 (50 L. Ed. 348, 26 Sup. Ct. Rep. 216); *McGowan v. Parish*, 237 U. S. 285 (59 L. Ed. 955, 35 Sup. Ct. Rep. 543, see, also, Rose's U. S. Notes).

It is stated in 9 Cyc. 483:

"As the habits, opinions, and wants of a people vary with the times so public policy may change with them. * * It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts, and agreements therefore are not to be held void as being contrary to public policy, unless they are clearly contrary to what the legislature or judicial decision has declared to be the public policy, or they manifestly tend to injure the public in some way."

2. The contract in question is not void upon its face. There was some competent testimony that it was a valid, lawful, and enforceable contract. It is identical in all its features with the contract before the Supreme Court of the United States, in the case of *Nutt v. Knut*, 200 U. S. 12 (50 L. Ed. 348, 26 Sup. Ct. Rep. 216, see, also, Rose's U. S. Notes), in which a commission amounting to about \$20,000 was recovered. As federal legislation is concerned in the present case, we think the cases above referred to before the United States Supreme Court should be taken as our guide.

The act of Congress (39 Stat. 1354), appropriating \$94,648.13 to pay the defendant and other claimants named in the act, has attached a proviso as follows:

“Provided, That no agent, attorney, firm of attorneys, or any persons engaged heretofore or hereafter in preparing, presenting, or prosecuting this claim shall, directly or indirectly, receive or retain for such service in preparing, presenting, or prosecuting such claim, or for any act whatsoever in connection therewith an amount greater than five per centum of the amount allowed under this bill to the person for whom he has acted as agent or attorney.”

In *Stanton v. Embrey*, 93 U. S. 549 (23 L. Ed. 983, see, also, Rose's U. S. Notes), where an attorney's fee for the prosecution of a claim against the United States before the officials of the Treasury Department, the services were rendered upon a contract for a contingent remuneration. The instruction of the trial court to the jury which was approved upon appeal to the Supreme Court of the United States, was in part as follows:

“Where an attorney in the exercise of his ordinary labor and calling, and with the instrumentalities of his professional learning and industry, undertakes to work out a desired result for his client, not through personal influence, but through the instrumentalities of the law—by persuasion, as distinguished from influence—such an undertaking is not an unlawful one, or contrary to public policy.”

A judgment for over \$9,000 was affirmed.

In 2 R. C. L., page 1041, Section 122, we read:

“In contracts between attorneys and clients the usual test would seem to apply that if a contract can by its terms be performed lawfully, it will be treated as legal, even if performed in an illegal manner; while, on the other hand, a contract entered into with intent to violate the law is illegal, even if the

parties may, in performing it, depart from the contract and keep within the law."

Public policy and sound morality demands that courts should put the stamp of their disapproval on every act and declare void every contract the ultimate or probable tendency of which would be to affect the integrity or misguide the judgment of those to whom the trust of legislation is confided. All legislators should act from high regard of public duty. Borrowing the language of the Ruling Cases:

"It is not the law that all contracts dependent upon future legislative action are against public policy, nor is it true that all contracts to secure legislative action are unenforceable. It is correct to say that the law guards the processes of legislation against improper influences with jealous care, and will not lend its aid to the enforcement of any contract which expressly or impliedly contemplates the employment of corrupt or otherwise improper methods to influence the official conduct of legislators, or others charged with public duty. But it would be a perversion of this salutary rule to say that it forbids all efforts of interested persons or classes to secure the adoption of desired legislative measures. The courts do not condemn the attempts to secure legislation for legitimate purposes and in a legitimate manner. (Citing *Cole v. Brown-Hurley Hardware Co.*, 139 Iowa, 487 (117 N. W. 746, 16 Ann. Cas. 846, and note, 18 L. R. A. (N. S.) 1161, 1661, and note); *Long v. Battle Creek*, 39 Mich. 323 (33 Am. Rep. 384); *Stroemer v. Van Orsdel*, 74 Neb. 113 (103 N. W. 1053, 107 N. W. 125, 121 Am. St. Rep. 713, and note, 4 L. R. A. (N. S.) 212, and note); *Houlton v. Nichol*, 95 Wis. 393 (67 N. W. 715, 57 Am. St. Rep. 928, 33 L. R. A. 166). * * But as the law does not presume that a person intends to violate its provisions, the general principle controlling the construction of a contract to influence legislation when the contract itself does not

in terms stipulate for improper means seems to be that it will be upheld, unless the use of such means appears by necessary implication. The test is, does the contract, by its terms or by necessary implication, require the performance of acts which are of a corrupt character or which have a corrupting tendency?": 6 R. C. L., p. 731, § 137.

The question arises in the present case: Did the services of the attorney require the performance of any corrupt act, or any act which has a corrupt tendency? The terms of the contract do not call for any corrupt or wicked act. In order to portray the tenor of the correspondence between the attorney and United States senators and members of Congress, we produce a portion of the correspondence found in the record as follows: first quoting a letter from Mr. Herrick to Senator Chamberlain.

"December 8, 1909.

"Hon. George E. Chamberlain, U. S. Senate, Washington, D. C.

"My Dear Senator: Referring to my recent interview with your private secretary relative to the claims of settlers in Sherman County, Oregon, I beg to advise as follows:

"All these settlers made homestead entry of what was then supposed to be public land and a large number of them were given patents by the Department upon the theory that the land grant of The Dalles Military Road Company had not attached because the land was situated in the overlapping limits of the Northern Pacific Grant. But in suits in the court, culminating in *Wilcox v. Eastern Oregon Land Co.*, 176 U. S. 51 (44 L. Ed. 368, 20 Sup. Ct. Rep. 269), and *Messinger v. Eastern Oregon Land Company*, 176 U. S. 58 (44 L. Ed. 370, 20 Sup. Ct. Rep. 271, see, also, Rose's U. S. Notes), it was held that the wagon road grant attached and thereupon the patents to the settlers were set aside and the title to the land confirmed in the Eastern Ore-

gon Land Company. The settlers were dispossessed and either compelled to remove or accept leases under the land company.

"The act of Congress approved February 26, 1904 (33 Stat. 51), directed the Secretary of the Interior to ascertain as to the amount of damages sustained by the various settlers, etc., and accordingly claims were submitted to Special Agent Neuhausen and incorporated by him in a report to the Department which was subsequently referred to Congress. In this connection see, also, Senate Resolution of June 7, 1900, Senate Document No. 8, of the 56th Congress, Second Session, and Doc. No. 240 of the 57th Congress, first session.

"The claims are still pending before Congress unacted upon, and upon behalf of the settlers, a large number of whom I represent, I write to request that you will look into the matter and endeavor to secure favorable action. In view of the investigation and report of the Interior Department it would seem that Congress could appropriate a sum of money to compensate these settlers for the loss of their lands and improvements, or that at the very least the claims could be referred to the Court of Claims under an act of Congress conferring jurisdiction upon that court to determine the amount of damages.

"I should be glad to call upon you personally in regard to the matter or if necessary appear before the Public Lands Committee. But it would seem necessary to introduce a bill at the present session to bring the matter before this Congress.

"Hoping to hear from you and with expressions of esteem,

"I am,

"Very truly yours,"

Together with an answer from the senator:

"United States Senate, Committee on Printing.

"December 9, 1909.

"Samuel Herrick, Esq., Westory Bldg., City.

"My dear Sir: I am in receipt of your favor of the 8th inst. in reference to the claims of the Sher-

man settlers. I will be glad to confer with you in reference to this matter and to take such steps as may assist in having the Government do justice to these men. I can learn better the status of the matter by a talk with you than from statements of the settlers.

"I have the honor to remain,
"Yours very respectfully,"

Also a letter from Senator Bourne, apparently in answer to the same kind of a letter:

"United States Senate, Committee on Fisheries.

"December 10, 1909.

"Mr. Samuel Herrick, Westory Bldg., Washington, D. C.

"My dear Sir: I am in receipt of yours of December 8th in regard to claims of settlers in Sherman County, Oregon, in which you informed me that the Secretary of the Interior has made a report upon the claims and that they should now be referred to the Court of Claims. I shall secure and study the Senate documents referred to by you and take such action as may seem best to secure justice for the claimants.

"Yours very truly,"

In this correspondence, as well as in the great mass of letters and documents found in the record, we find nothing indicating a corrupt motive, or tending in any way to improperly influence legislation. The senators and representatives from Oregon during the time the matter was pending, nearly all of whom were lawyers of high standing, and all eminent gentlemen of the highest standing and integrity, whose judgment in a matter of ethics in legislation, should not be overlooked or ignored, seem to have viewed the efforts and services of plaintiff as attorney for the claimants as perfectly proper. If any improper conduct had been attempted by the attor-

ney, we believe it would have been shown; and that Congress would not with the sanction of our delegation practically have allowed the attorney 5 per cent of the claims provided for in the act.

Can there be any doubt as to the propriety of the attorney conferring with Senator Chamberlain at the latter's request and informing him of anything in regard to the claims? A conference with any of the federal legislators at the instigation of the attorney would be governed by the same law, for it would not be consistent with duty for an attorney advancing the claim of his client to wait at all times for an invitation before approaching the officials having authority to act in the premises.

3. It is contended by the learned counsel for defendant that the contract is void for the reason it was attempted to be carried out in part by the claimants writing to the senators and representatives in Congress, upon the advice of their attorney.

The Constitution of the United States secures to the people the right to petition the government for a redress of grievances. It may be easy for an advocate to paint such correspondence in a high color and term it "bombarding," but the writer sees no wrong in these settlers in an informal way petitioning their senators and representatives. To deny this right is to deny a constitutional one. Neither did the senators or representatives appear to think there was any impropriety in the claimants so addressing them. If they had the right to lay their matters before congressmen, of necessity it follows that it was proper for the attorney to so advise them of such right. When much of the correspondence took place, apparently the matter had not reached a committee before whom the attorney could appear. Naturally

the first effort was to get the matter before a committee. The only way seen by which the contract can be condemned as unlawful is to presume that improper means were intended to be used, which were not stipulated by the contract.

4, 5. As before suggested, the services of the attorney were legalized by the provision above quoted regulating the compensation. Where such legislation has been enacted, it withdraws from the court the question of reasonable value of such services, and also supersedes an express contract to pay: 6 C. J., p. 753, § 333; *Mullan v. Clark*, 4 Idaho, 186 (38 Pac. 247); *Lynch v. Pollard*, 26 Tex. Civ. App. 103 (62 S. W. 945); *Ball v. Halsell*, 161 U. S. 72 (40 L. Ed. 622, 16 Sup. Ct. Rep. 554, see, also, Rose's U. S. Notes); *Tanner v. United States*, 32 Court Claims, 192. It is apparent that the members of Congress directly interested in the passage of the act had cognizance of the efforts of Mr. Herrick, as attorney for the defendant and other claimants, and it was undoubtedly with a view of settling the matter of his compensation that the proviso, above quoted, was incorporated in the law. Plaintiff, according to his claim, was instrumental in procuring the enactment of this law with the proviso. It would seem that he should be satisfied with the result of his labor. There is also testimony indicating that he assented to the condition and waived any compensation in excess of that provided for in the act. It is unnecessary for us to say whether such waiver is within the issues made by the pleadings, as there will be an opportunity to apply to amend the same.

It does not appear as a matter of law that any "lobbying" or any improper methods were resorted to by the attorney or those whom he represented,

or that the same was contemplated. These claimants, who had lost their land and who had a just claim against the United States for compensation therefor, had the right to petition, by letter or otherwise, to their senators and representatives in Congress, and either in person or by their attorney, to present and urge their claims before the proper Congressional committees and before the Department where the bill was referred. It was a purely business transaction. We find no improper means adopted or contemplated in this respect. The case differs, as night from day, from the case of *Sweeney v. McLeod*, 15 Or. 330 (15 Pac. 275). Some of these settlers spent years of the best part of their lives making a home upon the land which they lost, and all appear to have been making an honest effort to obtain compensation therefor through their employed attorney working openly and aboveboard and in so far as we can discover in perfectly legitimate ways.

6. A motion for nonsuit is a demurrer to the evidence and admits the truth of the evidence and every reasonable inference of fact which the jury may infer from it, and, if different conclusions can be drawn from the facts, the case should be left with the jury: *Jackson v. Sumpter Valley R. Co.*, 50 Or. 464 (93 Pac. 356); *Peabody v. Oregon R. & N. Co.*, 21 Or. 121, 136 (26 Pac. 1053, 12 L. R. A. 823); *Brown v. Oregon Lumber Co.*, 24 Or. 317 (33 Pac. 557); *Barr v. Rader*, 33 Or. 376 (54 Pac. 210); *Perkins v. McCullough*, 36 Or. 147 (59 Pac. 182); *Watts v. Spokane, P. & S. Ry. Co.*, 88 Or. 192 (171 Pac. 901).

It was conceded upon the reargument, by counsel for plaintiff, that he was bound by the provision for a commission of 5 per cent on the amount allowed

by the act of Congress. The testimony upon the issues was sufficient to carry the case to the jury and the trial court erred in granting the nonsuit.

It follows that the judgment of the lower court must be reversed and the cause remanded for such further proceedings as may be deemed necessary, not inconsistent herewith. It is so ordered.

REVERSED AND REMANDED.

BENNETT, J., Dissenting.—This is an action brought by the plaintiff, an attorney at Washington, D. C., to recover a contingent fee of 20 per cent of the amount of a claim allowed by Congress to the defendant.

The defendant's claim against the government arose out of an overlap between the grant of land to the Northern Pacific Railroad (forfeited) and the grant to the State of Oregon, afterward transferred to The Dalles Military Road Company, for the construction of a wagon-road from The Dalles to Canyon City, Oregon.

The grant to the Northern Pacific Railroad for a branch line down the Columbia River to Portland, was made in 1864, and gave the Northern Pacific Company the alternate or odd section for 40 miles on each side of the proposed road.

Three years afterward, in 1867, Congress made another grant to the State of Oregon, which was afterward transferred to The Dalles Military Road Company, of a strip three sections in width on each side of a proposed wagon road where the land "had not been otherwise disposed of."

The lands in question, and out of which Barzee's claim arose, were within the limits of both grants.

These lands were at one time withdrawn from set-

tlement by the government, as part of the Northern Pacific land grant. The branch line down the Columbia River, however, was never constructed. On September 29, 1890, Congress forfeited the same and the lands covered thereby were restored to entry.

The Land Department took the view that the lands within the overlap were "disposed of" by the grant to the Northern Pacific Railroad, and therefore did not pass to The Dalles Military Road Company, under its later grant, and that, when the Northern Pacific grant was forfeited, these lands became subject to entry under the homestead and other laws.

This position was contested by the successors of The Dalles Military Road Company, who claimed that no rights had vested in the Northern Pacific Railroad Company at the time of their grant in 1867, and that they therefore took the same. There was a long-continued litigation in relation to the matter, which finally reached the Supreme Court of the United States. While this suit was pending settlers were filing upon the lands in the United States land office, and their filings were being accepted by the government.

Finally, in the case of *Wilcox v. Eastern Oregon Land Co.*, 176 U. S. 50 (44 L. Ed. 368, 20 Sup. Ct. Rep. 269, see, also, Rose's U. S. Notes), submitted November 15, 1897, but not decided until January 8, 1900, the Supreme Court held that the map of the general line of the Northern Pacific Railroad Company which had been filed with the department in 1865, did not amount to a definite location, and that, therefore, the land was still subject to disposition by the government at the time of the grant to the State of Oregon in 1867, and passed

by said grant to the State of Oregon and afterward to the Military Road Company and its successors.

In the meantime, Barzee and many other settlers had settled upon their respective tracts and improved the same.

After their filings were canceled, they made the claim that the government should reimburse them for these improvements. In 1904 Congress ordered an investigation of these claims, and T. B. Neuhausen, an agent of the government, was sent out by the department to make such investigation. He made a careful and detailed investigation and filed his report about October 15, 1904, showing the details of each man's claim and the value of the improvements placed upon the land.

Up to this time the plaintiff does not claim to have had anything to do with the matter.

However, in 1908 or 1909, he claims to have made a written contract with these settlers, including the defendant Barzee.

The contract, as claimed by the plaintiff, was substantially as follows:

“The said party of the first part hereby employs the said party of the second part to prosecute before the Interior Department, the Congress of the United States, and if necessary, the United States Court of Claims, his claim against the Government for damages to him by reason of the annulment or cancellation of his patent issued by the Government, covering certain land in the state of Oregon, including damages by reason of the loss of the land and the loss of the improvements. In consideration for the said second party's professional services on this claim, the first party agrees to pay said second party the sum of twenty per cent (20%) of the amount recovered from the Government. Said sum to be due and payable within thirty days after the first party

receives warrant or draft from the Government covering the amount allowed him by Congress or the Court of Claims.

“The second party hereby contracts and agrees to prosecute said claim before Congress, and, if necessary, the Court of Claims, promptly and diligently, and with all reasonable expedition, and without further compensation than the amount specified to be paid him in the first section of this agreement, after the allowance of said claim and the issue of the warrant or draft to the first party.”

The terms of this contract were clearly broad enough to cover either legitimate or illegitimate and lobbying services.

Thereafter the plaintiff continued to perform services in the matter of expediting these claims before the different Congresses. Numerous bills were introduced and some of them passed the House and some passed the Senate, but none of them passed both houses and became laws until the 64th Congress in 1916.

Mr. Sinnott, whose home was in the immediate vicinity of these lands, became a member of that Congress and succeeded in obtaining the passage of a bill recompensing some of these settlers, including the defendant, in a sum amounting in the aggregate to about \$90,000. This act of Congress contained the following provision:

“Provided; that no agent, attorney, firm of attorneys, or any person engaged heretofore or hereafter in preparing, presenting or prosecuting this claim * * shall receive or retain for * * prosecuting such claim, or for any act whatsoever in connection therewith, an amount greater than five per cent of the amount allowed under this bill, to the person for whom he has acted as such agent or attorney”: 64 Congress, Vol. 39, p. 1355.

The services, which plaintiff claims to have performed under the contract, were largely in the nature of personal solicitation of individual congressmen, and the organizing of influence and pressure to be brought to bear upon them in order to induce favorable consideration of the measure allowing the claim. The plaintiff, however, claims to have also appeared before committees and before the department at different times between 1908 and 1916 in an effort to induce favorable consideration.

The cause was tried before the court and a jury, and at the end of plaintiff's case the defendant moved for a nonsuit and dismissal, on the ground that the contract was a lobbying contract, and that the services performed for the plaintiff thereunder, according to his testimony, were lobbying services, for which the plaintiff could not be permitted to recover. The court granted the motion for a nonsuit, and from the order granting the same the plaintiff appeals.

The sole question on this appeal is whether or not, on his own showing, the services rendered by the plaintiff under the contract, or a portion thereof, were of such a nature as to render the contract void, as against public policy and prevent the enforcement of the same.

It seems to be entirely settled that where a party contracts for a contingent fee to secure the passage of a measure in Congress, or any legislative body, and in pursuance of such contract attempts to secure its passage by private solicitation of individual congressmen or legislators, or by bringing influence to bear upon them, the contract is rendered void and will not be enforced by the courts: *Sweeney v. McLeod*, 15 Or. 330 (15 Pac. 275); *Hyland v. Hassam*

Paving Co., 74 Or. 1 (144 Pac. 1160, Ann. Cas. 1916E, 941, L. R. A. 1915C, 823); *Trist v. Child*, 88 U. S. (21 Wall.) 441 (22 L. Ed. 623, see, also, Rose's U. S. Notes); *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315 (40 Am. Dec. 519); *Harris v. Roofs*, 10 Barb. (N. Y.) 489; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Marshall v. Baltimore & O. R. R. Co.*, 16 How. 314 (14 L. Ed. 953, see, also, Rose's U. S. Notes).

In *Sweeney v. McLeod*, 15 Or. 330 (15 Pac. 275), there was a contract for services before the legislature. The court had been asked by the defendant to instruct the jury,

"That if it was the understanding between the plaintiff and defendants that plaintiff should attend at the session of the legislature, and there privately importune, converse with, and persuade members of the legislature in the interests of the defendants, against any measures pending before the legislature, antagonistic to the taking of salmon fish, by means of fish wheels, he cannot recover."

The refusal of this instruction was held error and Mr. Justice STRAHAN, delivering the opinion of the court, said:

"A person may without doubt be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for and receive pay for his services in preparing and presenting a petition, or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing or making an oral or written argument; provided all these are used, or designed to be used, either before the *legislature itself*, or some committee thereof *as a body*; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, *with individual members, or to labor privately in any form with*

them out of the legislative halls in favor of or against any fact or subject of legislation."

And again, quoting from *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315 (40 Am. Dec. 519):

"It matters not that nothing improper was done or expected to be done by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to the use of an extraneous, secret influence over an important branch of the government."

And again:

"When there is a single contract, and the services contracted for and rendered are partially those of an attorney, and partially those of a lobbyist, and blended together as part and parcel of a single employment, the entire contract is vitiated. That which is bad destroys that which is good and they perish together."

This opinion is squarely in point. There, as here, the lobbyist was working to further the honest interests of the defendant before the legislature, and there was just as much reason to believe the ultimate purpose was a good one, there, as here; and there, as here, the action of the legislative body was favorable to the claim advocated. The only difference is, here the claim of the defendant was affirmative, and there it was negative. There can be no distinction in that regard, and it seems perfectly clear that the above case is controlling, unless it is to be overruled.

In *Hyland v. Hassam Paving Co.*, 74 Or. 1 (144 Pac. 1160, Ann. Cas. 1916E, 941, L. R. A. 1915C, 823), there was a contract to pay a commission of 3 per cent on all contracts secured from the city council of the City of Portland. The opinion was by Mr.

Justice RAMSEY, who collated the authorities upon the subject at great length, and reached the conclusion that the contract was void, although the contract did not call for any improper services or private solicitation, and there seems to have been no evidence that there was anything of that kind. The court quoted with approval from *Weed v. Black*, 9 D. C. (2 MacArthur) 268 (29 Am. Rep. 618), as follows:

“If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services substantially performed sanctify an unlawful contract.”

It is strongly urged on behalf of the plaintiff and appellant, that the same rules do not apply to proceedings before Congress, as before a city council or a state legislature, but there does not seem room for any such a distinction and none seems to be recognized by the authorities.

Indeed, in the case of *Trist v. Child*, 88 U. S. (21 Wall.) 441 (22 L. Ed. 623, see, also, Rose's U. S. Notes), already cited from the court of the United States, the contract was almost exactly like the present one and was for services in the matter of presenting a claim against the government, growing out of a treaty; and the matter was presented before Congress in much the same way as was the claim in this case.

The court, after setting forth that an agreement for purely professional services, like drawing petitions and appearing publicly before committees, would be enforceable, said:

“But such services are separated by a broad line of demarcation from personal solicitation, and the

other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

“The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. I Mont. Sp. L., 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. * *

“The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

“If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their pri-

vate interests, the moral sense of every right minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

“If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter, and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

“It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

“We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void. We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis*. Where there is turpitude, the law will help neither party.

“The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.”

It seems that the principles of law announced by this court in the Sweeney case are not only supported by the vast weight of authority, but they are salutary and should be upheld and enforced, unless we wish to weaken the protection the law has thrown around legislative bodies, and sanction and judicially approve the army of paid lobbyists around our legis-

lative halls, who are already a disgrace and a menace to our institutions.

It will be a sorry day for our government, or for any democratic government, when the courts encourage the employment of such lobbyists working for a contingent recompense, to secure favorable action before a legislative body, by private personal solicitation of the individual members, and bringing to bear the pressure of organized influence upon the legislators.

It will be noted that, in nearly all the cases from which we have quoted, it has been held, that if part of the services rendered under the contract were valid and legitimate, as by the appearance before committees, etc., and part of them were illegitimate and in the nature of personal solicitation and influence, then the whole contract was vitiated and the plaintiff could not recover, at least upon the contract.

It is urged that the dividing line between what is proper and what is improper, should be drawn between "influence" on the one hand and "persuasion" on the other, without regard to the privacy or secrecy of the so-called persuasion. It seems difficult to find much difference between influence and persuasion. The dictionaries give them as synonymous words. To influence is to persuade and to persuade is to influence. Either one may be entirely honest and either may be corrupt. "Influence" may be derived from the most lofty qualities, and money or other bribery, is sometimes very "persuasive." If it is meant by the supposed distinction that, if the efforts of the lobbyist are corrupt and in the nature of bribery, then it is "influence," and, if honest, it is "persuasion," and that private solicitation

for a contingent fee is not unlawful unless actually corrupt, then such a distinction seems to find no single authority to support it, and it is in the face of the opinion in the Sweeney case in which it is said:

“It matters not that nothing improper was done or expected to be done by the plaintiff.”

It would be equally in the face of *Trist v. Child*, 88 U. S. (21 Wall.) 441 (22 L. Ed. 623, see, also, Rose's U. S. Notes), in the Supreme Court of the United States, where it is said:

“The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee (plaintiff) is said to be equally worthy. This can make no difference.”

Indeed, all the authorities unanimously repudiate any claim that there must be any actual attempt at corruption to make a lobbying contract void.

If proof of actual corruption and dishonesty were necessary in any given case, the rule would destroy itself. The mere fact that the solicitation was private and individual would render it so. If the legislator is corrupted, he will not be likely to disclose the fact, and the person who corrupted him will be as little likely to do so. If these contracts were recognized and enforced, it would encourage a great horde of professional lobbyists to hang around the halls of the legislature and of Congress, to bring influence and pressure to bear upon the members whenever large money interests were involved.

The rule inhibiting such contracts is not based upon actual corruption. It is based rather upon the opportunity for corruption; the temptation to corruption; the inducement for corruption. It rests in its insidious character; in its lack of publicity; in the *opportunity for wrongdoing*, which such private

solicitation of the paid lobbyist gives. It is a modified form of the protection which the law throws around the courts, although by no means so complete.

It would not be tolerated for a moment, if a lawyer should go privately to a judge, and solicit thus a favorable decision, or privately argue his case, or arrange with a great number of clients to bring their influence and the influence of their friends to bear upon him, or to organize a system of bombarding him with private letters.

On account of the conditions and necessities of the case, the rule is not entirely so strict as to members of a legislative body. The rule is relaxed, but some of its elements still remain. Some appeals can be made to members of a legislative body, which would not be tolerated as to a judge. But there are still some things, which the law will not countenance or approve even as to legislators. Even the legislator is not always fair game for the lobbyist.

The important elements in determining whether the acts of a paid lobbyist were legal are:

1st. Was his action open and public—as before Congress or a committee—or was it in the nature of a private and secret solicitation of the individual congressman?

2d. Was he acting for a contingent fee?

3d. Did he attempt to organize a pressure to be brought to bear upon members of the legislative body?

If any of these exist, it puts the contract in the doubtful class. If all concur, it is conclusive against the legality of the transaction.

It is true that it has been held by the United States Supreme Court that a contingent fee is not

always *conclusive*, against a lobbying contract, and that such a contingent fee may be legal, if it is solely *for work openly performed before a department or a committee*. But all the courts, including that high tribunal, agree that the contingent character of the fee has an important bearing in deciding whether a contract for such services is an unlawful lobbying contract or not: *Trist v. Child*, 88 U. S. (21 Wall.) 441 (22 L. Ed. 623, see, also, Rose's U. S. Notes); *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315 (40 Am. Dec. 519); *Richardson v. Scotts Bluff*, 59 Neb. 400 (81 N. W. 309, 80 Am. St. Rep. 682, 48 L. R. A. 294); *Bermudez v. Critchfield*, 62 Ill. App. 221. The fact of a large contingent fee tends to enhance the temptation and increase the danger, and is therefore one element to be considered.

The only remaining question is, whether or not all or any part of the services performed by the plaintiff in this case come within the prohibited category.

In *Trist v. Child*, already quoted from, the ground upon which the contract was held void was a letter written by the attorney to his client, in which he said.

"Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Get every man you know at work. Even if he knows a page, for a page often gets a vote."

This was held sufficient to show that the contract was a lobbying contract.

In the case at bar the plaintiff, according to his own testimony, was trying to get the measure through by personal solicitation of individual con-

gressmen, and by bringing influence to bear upon them. He says in one place:

"I took the matter up with Senators Bourne, Chamberlain and Lane of Oregon, with Congressman Ellis, Hawley and Sinnott of Oregon, *and with a number of other senators and congressmen from the different states.*"

At another place:

"I remember especially conferring with Senator Kittridge of South Dakota and Congressmen Burke and Martin of South Dakota, all of them from my state, and all of them influential members of the national legislature."

At another place:

"When Congressman Sinnott came to Washington I conferred with him about relief for the Sherman County claimants, and both previously and afterwards, *urged all my clients to write him and get his assistance, so I believe he was largely stirred to activity by this correspondence which I had caused to be directed to him.*"

At still another place he says:

"I had various claimants *bombard their senators and congressmen* with letters and also had *their friends in other states write different members of Congress who might be of assistance.*"

And again, at another place, referring to Senators Lane and Chamberlain:

"After having interviewed them jointly on that date *and requested them to use their best efforts in furthering the passage of the relief measure.*"

Another witness called by plaintiff testified:

"Mr. Herrick got in touch and kept in touch with every person *whose influence he deemed might be useful* in securing favorable action by congress on these claims."

If all this did not constitute "lobbying" and the organization and exercise of "influence" upon Congress, then it would seem that we shall have to radically change the accepted meaning of the words.

In short, the endeavors in this case seem to have been of exactly the same nature as those held improper by the Supreme Court of the United States in *Trist v. Child*, which decision has never been modified or even doubted and is still the law, as declared by that court.

The case of *Nutt v. Knutt*, 200 U. S. 12 (50 L. Ed. 348, 26 Sup. Ct. Rep. 216, see, also, Rose's U. S. Notes), which is strongly relied upon by the plaintiff, does not seem to relate at all to the contention here. There the question of the validity of the contract came up in a suit in equity, and the court below had, of course, to pass upon the facts. The evidence as to whether the plaintiff had made any private or personal solicitations of individual congressmen was in direct conflict, and there was just one witness each way. The plaintiff testified that he had made no such appeal, and the defendant testified that he had. Under these conditions the Mississippi court held that the burden to show such lobbying acts was upon the defendant, and found as a fact that the burden had not been sustained. 83 Miss. 365 (35 South. 686, 102 Am. St. Rep. 452). When the case reached the Supreme Court of the United States, it simply accepted the finding of fact of the court below, without even commenting upon the law, as to this question, at all.

The case of *Stanton v. Embrey*, cited by plaintiff from 93 U. S. 549 (23 L. Ed. 983, see, also, Rose's U. S. Notes), was a case where the services were performed before the Treasury Department, and

there was no evidence—not even a claim—that there was any private solicitation or lobbying of any kind.

Neither of these cases modify the rule established in *Trist v. Child* in the slightest, but, on the contrary, both cite the latter case with entire approval.

The quotation from 6 R. C. L., § 137, p. 731, which appears in the opinion of Mr. Justice BEAN, should, it seems, be read with Section 138, immediately following, which is as follows:

“The distinction between valid and invalid contracts to further legislation, appears to be that in the former the services or the result thereof are used, or designed to be used, *either before the legislature itself or some committee thereof as a body*, while in the latter a person is employed to exert his personal influence, whether great or little, with individual members, *or to labor privately in any form with them, out of the legislative halls*, in favor of or against any act or subject of legislation. There are, it is true, a few cases holding that personal solicitation of the members of the legislature in behalf of a pending bill, does not render the contract of employment invalid when no deception has been practiced, *but these cases are so opposed to the great weight of authority that they cannot be considered as changing the general rule.* * * As already stated, public policy requires that such a contract should be held void though there is no actual corruption in the particular case. Notwithstanding the fact that the contract does not expressly provide for personal solicitation, it will be declared illegal if it appears that in carrying out the contract it is necessary to resort to “lobbying.” It is enough that such is the tendency of the contract.”

It is apparent, therefore, that in order to uphold the contract in this particular case, and declare it valid as a matter of law, it would be necessary for us to overrule the decisions of this court in *Sweeney*

v. *McLeod*, 15 Or. 330 (15 Pac. 275), and *Hyland v. Hassam Paving Co.*, 74 Or. 1 (144 Pac. 1160, Ann. Cas. 1916E, 941, L. R. A. 1915C, 823), and to disregard the opinion of the Supreme Court of the United States in the *Trist* case; and the overwhelming weight of authority, as collated by this court in the *Hyland* case, and by the author of *Ruling Case Law* as quoted.

It may be that the question as to whether the services were in the nature of influence and private personal solicitation was one of fact for the jury, and in this view the case should be sent back to be submitted to a jury, under proper instructions; but I cannot agree that we should hold as a matter of law that the personal solicitation in this case was not lobbying, or that we should in any way repudiate the doctrine so carefully declared by this court in *Sweeney v. McLeod*, 15 Or. 330 (15 Pac. 275).

Argued April 7, modified May 25, 1920.

CHANCE v. WESTON.

(190 Pac. 155.)

Trusts—Oral Agreement to Hold Land Subject to Conveyance When Directed Held Void.

1. Where land was conveyed in trust for a woman under an agreement that the trustee should convey to her or as directed by her, and she orally directed the trustee to convey to her daughters, the power thereby given the trustee was void under the statute of frauds (Sections 804, 7398, L. O. L.), as the trust was for her benefit, and no trust could be created by parol for the benefit of the daughters.

Trusts—When Testamentary in Character, Could not be Executed After Death of Donor.

2. Where a woman for whose benefit land was conveyed in trust, under an agreement that the trustee should convey to her or as directed by her, directed the trustee to convey to her daughters, and the attempted trust in favor of the daughters was testamentary in

character, it could not be executed after her death, and the trustee's conveyance pursuant to such direction after her death was void.

Estates—"Estate in Fee" Defined.

3. An "estate in fee" is every estate which is not for life, for years or at will.

Curtesy—Exists in Equitable Estate Notwithstanding Statute; "Fee."

4. Section 7315, L. O. L., as amended by Laws of 1917, page 687, giving widowers the right as tenants by the curtesy to the use for life of one half of the lands of their wives, provided that any man entitled to curtesy may elect in lieu thereof to take the undivided third part of his wife's land in his individual right in "fee," does not abolish the right of curtesy in equitable estates as previously existing, as the word "fee" is used as meaning simply an estate of inheritance.

Curtesy—Depends on Character of Wife's Title.

5. A husband's right to curtesy depends on the character of the estate which the wife had in her lifetime, and not on the estate which her heirs would take by descent or the source of her title.

Curtesy—Husband not Barred by Conveyance in Trust for Wife.

6. Where husband and wife conveyed land in trust for the wife, and the wife died intestate as to such land, the husband was not barred by such conveyance of his right of curtesy in the land.

Curtesy—Dower—Contracts Between Husband and Wife are Void.

7. Husband and wife cannot contract with each other regarding any estate growing out of the marriage relation, and conveyances between them intended to cut off or relinquish curtesy or dower are void.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2.

Plaintiffs instituted this suit to obtain a decree declaring plaintiff Marion T. Chance entitled to curtesy in certain land described in the complaint, and that subject to such right plaintiff Addie Schmelzer be declared to be the owner in fee of an undivided one-fourth interest in the land as one of the four heirs of Laura I. Chance, deceased, the other heirs being defendants Rachel Weston, Myra Goeres and Georgia Tinnerstett.

Plaintiff Marion T. Chance, appeals from that part of the decree denying his right of curtesy. The defendants filed a cross-appeal from the part of the

decree canceling the deed from the defendant Tillamook County Bank to the above last-named defendants, and declaring plaintiff Addie Schmelzer entitled to a one-fourth interest in the land.

The decree was rendered by the Circuit Court on the pleadings, which show, in substance, the following facts: On March 7, 1918, plaintiff Marlon T. Chance and Laura I. Chance, now deceased, were husband and wife, and together conveyed by warranty deed to the defendant Tillamook County Bank, a corporation, the tract of land in suit. On the same date the grantors delivered with the deed the following written instructions to the defendant bank:

“To the Tillamook County Bank:

“The undersigned are this day executing and delivering to you a warranty deed conveying the following described real property, situated in Tillamook County, Oregon, to wit: [Here follows description of real property.]

“This conveyance is being made without any actual consideration, and with the understanding and agreement that the legal title thereto is to be held by you in trust for Laura I. Chance, and that you shall convey the legal title to the said property to the said Laura I. Chance, or as directed by her, at any time when she shall request you so to do; all necessary expenses to be paid by her. Dated this March 7, 1918.

“MARION T. CHANCE,
“LAURA I. CHANCE.”

On the same day the Tillamook County Bank in writing acknowledged the receipt of the conveyance, and declared that the legal title was to be held by it in trust, and conveyed in accordance with the provisions of the foregoing declaration.

It is alleged in the answer, in effect, that the conveyance was executed in the settlement of property

rights between the husband and wife in contemplation of divorce proceedings by Laura I. Chance, and that certain other personal property was transferred to plaintiff Marion T. Chance. No divorce suit was ever instituted.

On August 20, 1918, Laura I. Chance died. The defendant bank still held the legal title to the land in question in trust for the use and benefit of Laura I. Chance, the deed therefor having been placed of record immediately after its delivery. The bank, however, asserted that Laura I. Chance had given it oral instructions, about ten days before her death, to convey the land to three of her daughters, namely, defendants Rachel Weston, Myra Goeres, and Georgia Tinnerstett.

On August 30, 1918, the defendant bank conveyed the land to the above-named three daughters of the deceased, the deed being duly recorded. Laura I. Chance, deceased, although making a will, died intestate as to the land which was not mentioned in the will. Therefore the land descends to the heirs at law of the deceased. Prior to her death she made no disposition of the real property by any writing.

On the date of the deed to the bank Mr. and Mrs. Chance executed an agreement, dividing their personal property, she giving her interest in certain personal property on the farm to him, and he giving his interest in certain personal property thereon to her. It is recited in the agreement that the farm and personal property were then leased for a term ending January 1, 1919. It was agreed that the rent of the real and personal property should be equally divided between them until the end of the term of the lease. It was further agreed thereby that the con-

tract and conveyance constituted a full settlement of all property rights between the parties. MODIFIED.

For appellant, Marion T. Chance, there was a brief with oral arguments by *Messrs. Johnson & Handley*.

For respondents and cross-appellants there was a brief over the names of *Mr. H. T. Botts* and *Mr. Geo. P. Winslow*, with an oral argument by *Mr. Botts*.

BEAN, J.—The trial court concluded that the conveyance from the Tillamook County Bank on August 30, 1918, to defendants Rachel Weston, Myra Goeres, and Georgia Tinnerstett was not effective to invest the title to the real property in the grantees named therein, because the conveyance was not executed and delivered prior to the death of Laura I. Chance, and the authority of the defendant Tillamook County Bank to execute such conveyance to said grantees ceased upon the death of Laura I. Chance; and that said conveyance should be canceled of record. The appeal of the defendants from this portion of the decree raises the first question for determination.

It is the contention of the defendants that, when the Tillamook County Bank, the trustee, received oral instructions from Laura I. Chance on August 10, 1918, to convey the land to Mrs. Chance's three daughters above named, the bank, as trustee, was bound by the trust agreement to convey the property according to Mrs. Chance's instructions, and the trustee thereafter held the property in trust for the grantees named by Mrs. Chance, and the execution of the trust, even though nonenforceable by the grantees, cannot be questioned. They cite and rely

upon the case of *Richmond v. Bloch*, 36 Or. 590 (60 Pac. 385). That was a case where a husband conveyed land by absolute deed to his wife on the verbal agreement that she should hold it in trust for their children. Her conveyance of the land to the children was upheld as against her creditors.

The death of Laura I. Chance having occurred before the conveyance by the bank to her three daughters, there was nothing at the time of her death upon which this new alleged trust could rest other than the oral instructions of Mrs. Chance. No other power was given to the defendant bank to convey the land. Section 804, L. O. L., provides *inter alia* that no trust or power concerning real property can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law. Section 7398, L. O. L., is as follows:

“Every grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent, lawfully authorized shall be void.”

1, 2. The power, if any, given to the defendant bank to convey the real estate to the three daughters was given by parol, and was void under the statute of frauds. The deed executed by the bank to three of the defendants after the death of Laura I. Chance was executed without authority. A trust in real estate cannot be created by parol: *De Vol v. Citizens' Bank*, 92 Or. 606 (179 Pac. 282, 181 Pac. 985); *Riggs v. Adkins*, 95 Or. 414 (187 Pac. 303); *Doran v.*

Doran, 99 Cal. 311 (33 Pac. 929); *Cooper v. Thomson*, 30 Or. 161 (45 Pac. 206); *Annis v. Wilson*, 15 Colo. 236 (25 Pac. 304). The trust created by the conveyance to the bank was admittedly for the benefit of Laura I. Chance, deceased, and no trust thereafter could be created by parol for the benefit of the defendants. If any such trust was attempted by Laura I. Chance during her lifetime, the same was testamentary in character, and therefore could not have been executed after her death: *Stone v. Ladd*, 40 Or. 606 (67 Pac. 413); *Rose v. Oliver*, 32 Or. 447 (52 Pac. 176); *Richardson v. Orth*, 40 Or. 252 (66 Pac. 925, 69 Pac. 455). It is stated in 1 Mechem on Agency (2 ed.), section 652, page 462:

“It is therefore the general rule that the authority of an agent, not coupled with an interest, is instantly terminated by the death of the principal, even though it may have been irrevocable in his lifetime; and that any attempted execution of the authority after that event is not binding upon the heirs or representatives of the deceased principal.”

That part of the decree annulling the deed from the bank is affirmed.

The next question for consideration is as to the right of curtesy of plaintiff Marion T. Chance in the land. It is contended by counsel in behalf of plaintiff Marion T. Chance that he is entitled, as tenant by the curtesy, to the use during his natural life of one half of the land described in the complaint.

It is contended by counsel for defendants that Marion T. Chance is barred from any right of curtesy by virtue of the deed executed to the bank and the contract of settlement of property rights between him and his wife. Also that under the Statute of 1917, he is not entitled to curtesy in an equitable estate of his deceased wife. Section 7315, L. O. L.,

as amended by Chapter 333, General Laws of Oregon 1917, page 688, reads as follows:

“The widower of every deceased person shall be entitled, as tenant by the curtesy, to the use, during his natural life, of one half of all the lands whereof his wife was seised of an estate of inheritance at any time during the marriage, although such husband and wife may not have had issue born alive, unless he is lawfully barred thereof. (*Provided, however, that any man entitled to curtesy, may, at his election, take in lieu of such curtesy, the undivided third part in his individual right in fee of the whole of the land whereof the wife was seised of an estate of inheritance at any time during the marriage, unless he is lawfully barred thereof. And provided, further, that when a widower shall be entitled to an election under this section, he shall be deemed to have elected to take the undivided third of such lands unless within one year after the death of his wife he shall commence proceedings for the assignment or recovery of his curtesy.*) Estates by the curtesy, may be admeasured, assigned and barred in the same manner that dower may be admeasured, signed (assigned) and barred; and, as far as practicable, all other laws of this State applicable to dower shall be applicable in like manner and with like effect, to estates by the curtesy.”

The amendment of 1917 added that portion of the section above quoted which is included in parentheses.

It was held by the trial court that under the amendment of 1917, “curtesy, or the interest of the husband in the lands of the wife, should attach only to an estate of inheritance of which the wife was seised at any time during marriage, and that an estate of inheritance as so used would include only fee simple estates.” This was because of the provisions that the widower should have an election to

take an undivided one third of such lands in fee, and there could be no fee in an equitable estate.

The main reliance of defendants is upon the opinion in *Jenkins v. Hall*, 26 Or. 79 (37 Pac. 62). In that case the husband was about to abandon and desert his wife, and, in consideration of her joining with the plaintiff in conveying other real estate belonging to him, conveyed the land to her by deed which contained the following clause:

“This deed is made by the party of the first part, and accepted by the said party of the second part, in compliance with a mutual contract for the separation and segregation of the lands, properties, and effects of and belonging to the said parties, or either of them, so that the same may be hereafter held in severalty by each, without any claim thereon by the other; and the said party of the first part hereby covenants with the second party, her heirs and assigns, that neither he nor his heirs, executors or administrators shall or will, at any time in the future, make or claim any right, title, or interest of, in, or to the said lands or premises hereby conveyed, or any part thereof.”

We find no such covenant in either the deed executed by Marion T. Chance and wife, nor in the contract between them relating to the personal property. As a general rule the husband is tenant by the curtesy of the wife's equitable estates of inheritance as well as her legal estates, if the requisites exist which would entitle him to curtesy in the latter: 17 C. J., p. 424, § 26; 12 Cyc. 1010; 8 R. C. L., p. 396, § 8; *Jackson v. Bechtold Printing etc. Co.*, 86 Ark. 591 (112 S. W. 161, 20 L. R. A. (N. S.) 454); *Dugan v. Gittings*, 3 Gill (Md.), 138 (43 Am. Dec. 306).

Under the curtesy statute in force until 1907, the courts of this state held that in Oregon the right

of curtesy was governed by precisely the same rules as at common law, except the right did not depend upon the birth of a child alive: *Farnum v. Loomis*, 2 Or. 29; *Whiteaker v. Vanschoiack*, 5 Or. 113; *Runyan v. Winstock*, 55 Or. 202 (104 Pac. 417, 105 Pac. 895); *Beam v. United States*, 162 Fed. 260 (89 C. C. A. 240); *Parr v. United States* (C. C.), 153 Fed. 462. In 1907 (Laws 1907, p. 152) the statute was amended to read as in Section 7315, L. O. L., before the amendment of 1917. In 1919 (Laws 1919, p. 622), the legislature again amended Section 7315 so that the same reads as it did before the amendment of 1917. This last amendment does not affect the present case.

3. An estate in fee is every estate which is not for life, for years, or at will: 3 Words & Phrases, 2706, where we read:

“ * * In Modern English tenures a fee signifies an estate of inheritance and a fee simple imports an absolute inheritance, clear of any condition or limitation whatever, and, when not disposed of by will, descends to the heirs generally. There are also limited fees; (1) qualified or base fees; (2) fees conditional at the common law.”

Fee simple is defined in Bouvier's Law Dictionary as:

“An estate of inheritance. Cole, Litt. 1 b; 2 Blackstone Comm. 106. * * It is the largest possible estate which a man can have, being an absolute estate in perpetuity. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate: Plowd. 557; Atkinson, Conv. 183; 2 Sharswood, Blackst. Comm. 106.”

The terms “fee” and “fee simple” are often used as convertible terms: 3 Words & Phrases, 2706; 12 Am. & Eng. Ency. of Law (2 ed), 890.

4. In the amendment of 1917, we think the word "fee" taken in connection with the whole section means simply an estate of inheritance. Otherwise it would contradict the former portion of the law declaring a widower entitled to curtesy or one-half part of all the lands whereof his wife was seised of an estate of inheritance.

The amendment of 1917 does not indicate a legislative intent to change the character of the title of estates to which the right of curtesy attaches. Had the legislature intended to change the long-established rule entitling a husband to curtesy out of the wife's equitable estate of inheritance, it would have been very easy to have expressed it thus. We cannot believe that the amendment abolished the right of curtesy to an equitable estate.

5, 6. The next question is, Was the plaintiff, Marion T. Chance, barred by virtue of the conveyance executed to the bank? The right of the husband to curtesy depends on the estate which the wife had in the property in her lifetime and not on the estate which her heirs would take by descent. It is not important whence or by what means the wife acquired her title. The tests to be applied relate to the character of the title and not to its source. Hence the right of curtesy of a husband exists, though the property was acquired by her through a conveyance from him to a third person who subsequently conveyed it to his wife: 8 R. C. L., p. 395, § 7. It is also stated in Section 8 thus: "The authorities are practically agreed that curtesy may exist in lands in which the wife has an equitable estate of inheritance (citing among other authorities, *Ogden v. Ogden*, 60 Ark. 70 (28 S. W. 796, 46 Am. St. Rep. 151), wherein the court held that a husband

was entitled to curtesy in lands conveyed by him to his wife, such a conveyance vesting her with an equitable estate only). See, also, 17 C. J., p. 423, § 22. In 8 R. C. L., p. 399, Section 12, we read:

“Wife’s Separate Estate.—It is clear that at common law it was not competent in a grant to a woman of an estate of inheritance to exclude her husband from his right of curtesy, and the fact that he was not entitled to receive the rents and profits did not defeat his right; and while a husband is entitled to curtesy in the equitable separate estate of his wife, there is no doubt but that such an estate may be so limited as to give a wife the inheritance and at the same time to exclude and deprive the husband of curtesy by words clearly denoting that intention.”

The same principle is stated in 17 C. J., page 424, Section 24; and page 425, Section 27, where it is declared that the right of curtesy is favored in the law, and a husband will not be excluded from rights in property springing from the marital relation except by words that leave no doubt of the intention so to do, nor will he be excluded by words of restraint, limitation, proviso, or condition; and it has been held broadly in England that the husband cannot be excluded from curtesy in the wife’s separate estate.

The great weight of authority is that where a husband conveys property to his wife in such manner that it becomes a part of her separate estate he is entitled to curtesy therein unless an intent to the contrary clearly appears: 8 R. C. L., p. 399, § 11.

7. In Oregon neither husband nor wife can contract with the other regarding any estate growing out of the marriage relation, and conveyances between married persons intended to cut off or relinquish such estates as curtesy or dower are entirely

void: *Jenkins v. Hall*, 26 Or. 79 (37 Pac. 62); *House v. Fowle*, 20 Or. 163 (25 Pac. 376).

A contract between a wife and her husband for the elimination by him of his curtesy estate in her property, the right to which is given by Section 7315 and by Section 7318, as amended by Chapter 331, Laws of 1917, which provides that: "A married woman may, by will, dispose of any real estate held in her own right, subject to any rights which her husband may have as tenant by the curtesy or his election thereunder," is held to be entirely void both at law and in equity as being against the public policy of the state of Oregon: *McCrory v. Biggers*, 46 Or. 465 (81 Pac. 356, 114 Am. St. Rep. 882); *Potter v. Potter*, 43 Or. 149 (72 Pac. 702).

Plaintiff Marion T. Chance, as the widower of Laura I. Chance, deceased, is entitled as tenant by the curtesy to the use during his natural life of one half of the land described in the complaint. The decree of the lower court is modified accordingly. Neither party will recover costs or disbursements herein.

MODIFIED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ.,
concur.

Argued at Pendleton May 4, affirmed June 1, 1920.

HORN v. ELGIN WAREHOUSE CO.

(190 Pac. 151.)

Witnesses—In Action for Breach of Warranty of Seed Wheat, Plaintiff can be Asked on Cross-examination how much he Paid.

1. In an action for breach of warranty of the variety of seed wheat, where the purchase of any wheat was in issue under the pleadings, plaintiff can be cross-examined as to how much he paid for the wheat in question; since payment of the purchase price is an element of the consummated sale of the wheat.

Sales—Evidence That Variety of Seed Sold Would have Produced Crop Next Year Admissible in Mitigation.

2. In an action for breach of warranty that wheat purchased for seeding was a spring wheat, whereas in fact the wheat delivered was a winter wheat, evidence that, if the wheat was of the variety claimed by plaintiff, it would have produced a crop next year, was admissible in mitigation of damages under the general issue.

Evidence—Admitting Evidence of Experiments Rests Largely in Court's Discretion.

3. In an action for breach of warranty of variety of wheat sold as seed for spring planting, defendant's evidence that another purchased and planted some of the same lot of wheat and it produced no crop was evidence of an experiment, the admission of which rested largely in the discretion of the trial court to determine whether the conditions of the experiment were similar to those of the case in issue.

Evidence—Excluding Plaintiff's Evidence of Unsuccessful Planting Held Proper, Though Defendant Showed Successful Planting.

4. In an action for breach of warranty that wheat purchased for seed was a spring wheat variety, evidence that plaintiff's witness purchased some of the same lot of wheat, and it produced no crop, was properly excluded, because the conditions were not shown to be the same; though defendant's testimony that others sowed some of the wheat, and it produced a crop of the variety specified, was admissible.

Sales—Evidence That Defendant's Foreman Purchased Wheat for Another Held Admissible to Show Alleged Agency.

5. In an action for breach of warranty of wheat sold for seed, where defendants alleged that they sold the wheat merely as agents for a disclosed principal, evidence by defendant's foreman that he bought the wheat for the account of the alleged principal was admissible.

Trial—Submission of Special Issues is Discretionary.

6. Whether particular questions of fact shall be submitted to the jury for their finding in addition to the general verdict is within the discretion of the trial court.

Trial—Submission of Special Issues Held not Abuse of Discretion.

7. In an action for breach of warranty of wheat sold for seed, where defendant pleaded a sale as agent for a disclosed principal, it was not an abuse of the trial court's discretion to submit special questions whether the sale was made as agent and whether the agency was disclosed to plaintiff.

Trial—General Verdict Controls Unless Special Finding is Inconsistent.

8. Under Section 155, L. O. L., providing that a special finding inconsistent with the general verdict shall control, the general verdict must prevail unless the special finding is inconsistent.

Sales—Evidence Held not to Show Express Warranty of Variety of Seed Wheat.

9. In an action for breach of warranty of the variety of wheat sold for seed, plaintiff's testimony that he knew defendant was not selling the wheat as seed wheat under the restrictions of law held to warrant the jury in finding there was no warranty of quality or variety, so as to render the rule of caveat emptor applicable.

Sales—Warranty of Variety of Wheat Seed Held not Implied Where Buyer Inspected it.

10. Where wheat was sold for seed without any express warranty of quality or variety, and the buyer had opportunity to inspect it before he purchased it, a warranty of variety cannot be implied, though the buyer was unable to determine the variety by inspection, in the absence of showing that the seller knew of such inability or practiced fraud on the buyer.

Sales—General Verdict for Defendant Sustained, Notwithstanding Finding of Undisclosed Agency.

11. A finding by the jury on special issues that defendant's agency for another was not disclosed to plaintiff does not warrant judgment for plaintiff, notwithstanding a general verdict for defendant, where there was evidence from which the jury could find that there was no warranty of the variety of seed wheat for breach of which plaintiff brought his action.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The plaintiff, engaged in farming certain described lands in Union County, says in substance that on or about the — day of April, 1919, at Elgin, Oregon, he ordered of the defendant five sacks of Red Chaff club wheat, a spring wheat suitable for spring seedling, to be used as seed and sown for the purpose of raising a crop upon said premises during 1919, all

of which was communicated to the defendant. He further says:

“That the defendant then and there sold and delivered to the plaintiff five sacks of wheat, for a valuable consideration, and then and there, as part of the contract of sale, represented and warranted the same to be of the variety ordered, viz., Red Chaff club wheat.”

He states that he did not know and could not tell from inspection whether it was that kind of wheat or some other variety, but confided in and relied solely upon the representations and warranty of the defendant as alleged. He goes on to say that, relying upon the representations and warranty of the defendant, he sowed the wheat on his premises, but in truth and in fact the grain was not of the Red Chaff club variety, but was a winter wheat, by reason of which it did not produce a crop during the summer of 1919, all to his damage in the sum of \$500.

The answer consisted solely of a denial of the complaint, except the statement of the corporate character of the defendant.

At the trial, the defendant claimed that the wheat belonged to the Kerr-Gifford Company and that it conducted the sale solely as the agent of that concern, all of which it avers was disclosed to the plaintiff at the time. There was a dispute in the testimony on that subject. The court submitted to the jury two special interrogatories in relation to that matter. After hearing the charge of the court at the close of the trial, the jury retired and later returned the following verdict:

“We, the jury in the above entitled action, find for the defendant.

“J. E. REYNOLDS, Foreman.

“Q. Did the wheat delivered by the defendant company to the plaintiff, belong to the defendant or to Kerr-Gifford Company?

“A. Kerr-Gifford Company.

“Q. If you find that the wheat belonged to the Kerr-Gifford Company, was plaintiff informed at the time that he purchased the wheat that Kerr-Gifford Company was the owner thereof?

“A. No.

“J. E. REYNOLDS, Foreman.”

On the reception of this verdict the plaintiff moved the court for judgment in his favor notwithstanding the general verdict, and that the plaintiff's damages be assessed. This motion was denied and judgment was rendered for the defendant. The plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. L. Denham*.

For respondent there was a brief and an oral argument by *Mr. R. J. Green*.

BURNETT, J.—1. It appears that the court allowed the defendant to ask the plaintiff on cross-examination how much he paid for the wheat in question, and the plaintiff predicates error on this matter. An issue in the case was whether or not the plaintiff had bought the wheat at all. One possible element of a consummated sale is the payment of the purchase price. Hence it was legitimate cross-examination of him on that subject to ask the question as stated.

2. The plaintiff's contention was to the effect that the wheat actually delivered was of the variety-called “Forty-fold.” In cross-examining his witnesses the defendant was permitted to ask them whether

Forty-fold would not have lived over the year 1919 and produced a crop in 1920. This testimony was admissible in mitigation of damages under the general issue as tending to show that the plaintiff's loss was not total, but that he might expect belated returns from his venture.

There was testimony to the effect that the wheat in question was grown on the farm of Luther Hindman, and that it was stored in the defendant's warehouse in a separate pile in sacks. The plaintiff called one Smith as a witness, asked him if he sowed any grain "this spring," which being answered affirmatively, this question was propounded: "Upon your land—where did you get the seed?" The defendant's objection that this question was immaterial was sustained. The plaintiff then made this offer of proof:

"I want to know where he got the wheat, to be followed by the question what kind of wheat it was, expecting to prove that he got it from the Elgin Warehouse Company; that he ordered Red Chaff club wheat and sowed it as such, and that it sprouted up above the ground, and there it died—failing to produce a crop."

On the other hand, in support of its case the defendant produced the testimony of witnesses to the effect that they got some of this same Hindman wheat which they sowed during the season of 1919, and that it produced Red Chaff club wheat.

3. All these matters about planting wheat were in the nature of proof of experiments and, as stated by Mr. Justice LORD in *Leonard v. Southern Pacific Co.*, 21 Or. 555 (28 Pac. 887, 15 L. R. A. 221):

"In all cases of this sort, very much must necessarily be left to the discretion of the trial-court; but when it appears that the experiment or demonstra-

tion has been made under conditions similar to those existing in the case at issue, its discretion ought not to be interfered with."

4. The offer made by the plaintiff in reference to the Smith seeding does not show that the conditions under which the experiment was made were the same as those affecting the planting made by the plaintiff. Necessarily the growth of seed is influenced by the nature and moisture of the soil and climatic conditions, as well as by cultivation. In the offer nothing is stated except that Smith ordered Red Chaff club wheat from the defendant, sowed it as such and failed to produce a crop. All other ingredient conditions are omitted from the proposal. It is essential to its admissibility in evidence that the experiment relied upon be substantially similar to the one in issue. At first blush, one would say that the court did not hold the scale of justice at an even balance in refusing the plaintiff's offer of proof and at the same time allowing the defendant to show that the same kind of wheat sown by other parties produced a crop of Red Chaff wheat. It is a law of nature that men do not gather grapes of thorns, or figs of thistles. Hence when it appears that planting the wheat obtained from the defendant produced Red Chaff club wheat, all conditions of soil, climate and cultivation are merged in the ultimate result. The court was well within its discretion in allowing the result of the experiments offered in proof by the defendant and in excluding the negative experiment offered by the plaintiff. The former savored of demonstration while the latter did not show that it was grounded on the same or similar conditions that spelled failure for the plaintiff. On the general subject of experiments, reference is made to

Kohlhagen v. Cardwell, 93 Or. 610 (184 Pac. 261), where it is discussed by Mr. Justice BENNETT.

5. Another complaint on appeal is:

“That the court erred in overruling the plaintiff’s objection to the question propounded by the defendant to the witness Harlan Huffman, as to how the warehouse company paid Hindman for the wheat sold by him to the warehouse company.”

Huffman was the foreman or manager of the defendant’s warehouse. The object of his testimony was to show that he purchased the wheat from Hindman for the account of Kerr-Gifford Company, and it was permissible for him to narrate the manner in which the purchase was made.

6. Finally, the plaintiff complains of the submission by the court of special interrogatories to the jury, and in overruling his motion for judgment in his favor on the special verdict. In *Herrlin v. Brown*, 71 Or. 470 (142 Pac. 772), it is said:

“Submission of the particular question of fact to be answered by the jury in addition to their general verdict in the case at bar was a matter wholly within the discretion of the trial court, and will not be reviewed on appeal”: citing *Swift v. Mulkey*, 14 Or. 59 (12 Pac. 76); *Knahtla v. Oregon Short Line R. Co.*, 21 Or. 136 (27 Pac. 91); *Wild v. Oregon Short Line R. Co.*, 21 Or. 159 (27 Pac. 954); *White v. White*, 34 Or. 141 (50 Pac. 801, 55 Pac. 645); *Palmer v. Portland R. L. & P. Co.*, 62 Or. 539 (125 Pac. 840).

7. It was admissible under the general issue to show that the transaction occurred between the plaintiff and the Kerr-Gifford Company, operating through the defendant as the known agent of that concern. If true, this would refute the charge of the plaintiff that he dealt directly with the defend-

ant as a principal party. *Apropos* of that issue it was competent to prove that the wheat was the property of Kerr-Gifford Company. It was equally appropriate to determine whether or not the agency of the defendant was disclosed to the plaintiff. The interrogatories were proper on that issue, and we cannot say that the trial judge abused his discretion in calling for a special verdict on that branch of the case. From the special verdict all that can be deduced is that the agency of the defendant was not disclosed to the plaintiff at the time of the transaction.

8. It is said in Section 155, L. O. L.:

“When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter and the court shall give judgment accordingly.”

The plain import of this section is that the general verdict must prevail unless the special finding of fact shall be inconsistent therewith. The jury might well have found in this case, as indicated by its special verdict, that the defendant dealt with the wheat in question as its own without revealing to the plaintiff that the property was that of another; and, notwithstanding all this, might have found that the defendant made no warranty respecting the variety of the wheat or its fitness for seed.

9. On this branch of the case we here insert an extract from the plaintiff's own testimony on cross-examination respecting the transaction with the foreman of the defendant:

“Q. You don't remember him saying anything about that—that he did not have seed wheat for sale?

“A. Oh, well; now I know well enough they wouldn't sell me what you would call seed wheat, if I had went there to buy seed wheat. I would

have had to take it to the mill and had it cleaned. I went there to buy some spring wheat that was suitable for seed wheat. If it had oats, wild oats, in it, I expected to take it to the mill just as I did and have it taken out, and have it prepared for seed.

"Q. You knew they were not selling you seed wheat?

"A. Well, I knew they were not selling it under the seed law.

"Q. And that they were not guaranteeing it as seed wheat, didn't you?

"A. All I know, I went there and asked him if he had any little club, and he said he had none. I went there with the expectation of taking my chances on the wheat as to whether it would grow or not—as to whether it was clean or not. I was going to avail myself of that, after I had this talk with him and have it cleaned; and when he said he didn't have any little club, but he said he had some Red Chaff club there that would be suitable for spring seed—spring wheat, that is.

"Q. You are familiar with the business of the Elgin Warehouse Company, and they told you they would not sell, or guarantee any wheat, seed wheat?

"A. I knew that they would not guarantee any wheat for seed under the laws of the state, what the law requires them to go through in order to sell seed wheat.

"Q. So you figured you were taking a large chance on your end of it, didn't you?

"A. Yes, I had bought seed wheat there before."

The jury was justified in believing that there was no warranty of the quality or variety of the wheat. It is instructive to consider the doctrine of *Barnard v. Kellogg*, 10 Wall. 388 (19 L. Ed. 987, see, also, Rose's U. S. Notes), quoted thus by Mr. Justice LORD in *Morse v. Union Stock Yard Co.*, 21 Or. 289 (28 Pac. 2, 14 L. R. A. 157); 34 Cent. L. J. 153:

"'No principle of the common law,' said Mr. Justice DAVIS, 'has been better established, or more

often affirmed, both in this country and in England, than that in sales of personal property, in the absence of an express warranty, where the buyer has an opportunity to inspect the goods, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies.' "

10. The testimony does not disclose any express warranty. All that could be derived from it under any view of the case would be an implied warranty, such as was discussed in *Morse v. Union Stock Yard Co.*, where the contract was made by correspondence in which the plaintiff ordered the defendant to "get two carloads of good beef cattle." There, the plaintiff had no opportunity to inspect the animals. They were shipped to him by railroad after he had paid for them, and the court held in substance that where goods or chattels are sold by description, there is an implied condition that the goods or chattels delivered shall correspond to that description, and that in such a sale by description, when the buyer has not inspected the goods and has had no opportunity therefor, there is a condition precedent that the goods or chattels shall answer the description, and an implied warranty that they shall be fit for the particular purpose to which they shall be applied, when that purpose is known to the vendor. The case at bar is of a different sort. The plaintiff had the opportunity to inspect the wheat and to determine for himself its variety and quality. That the plaintiff was unable through want of skill or otherwise to distinguish between Red Chaff wheat and other kinds does not affect the case as stated in the complaint, for it is not averred that the defendant knew that he was deficient in ability to classify grain as to its variety, or that the defendant practiced any

fraud upon him on that account. The jury properly might have considered that it was a case falling within the doctrine of *caveat emptor*, although the parties were dealing as if the wheat were the property of the defendant and as if the question of agency or property in the Kerr-Gifford Company were not involved.

11. The general verdict for the defendant is not impeached by the special verdict. It is consistent with what the jury legitimately found to be the case, that there was no warranty of the wheat, either express or implied. For these reasons the judgment is affirmed. **AFFIRMED.**

Argued at Pendleton, May 3, affirmed June 1, 1920.

MILLER v. CONLEY.*

(190 Pac. 301.)

Adverse Possession—Evidence—Gift by Father to Daughter.

1. In a daughter's suit to quiet title to land claimed to have been given her by her father, evidence held to show that the father made a parol gift of the land to the daughter, at which time she took possession of the land as her own, and continued in exclusive occupancy under the gift.

[On presumption and burden of proof of undue influence in case of conveyance intervene as between parent and child, see notes in 17 Ann. Cas. 989; Ann. Cas. 1915D, 711.]

Adverse Possession—Gift of Land by Parol—Possession for Ten Years Gives Fee-simple Title.

2. Where a gift of land is made by parol, and the donee takes possession, adverse possession is established, which, continued for ten years, gives the donee a fee-simple title.

Waters—Diversion for Less Than Ten Years—No Vested Right.

3. Where a father made a parol gift of land to his daughter, and, after her adverse possession had ripened into a fee-simple title, the father went on the land and laid a pipe-line diverting water to other

*Authorities passing on the question of adverse possession by donee under parol gift are collated in a note in 35 L. R. A. 835. REPORTER.

premises, the diversion not having continued for ten years, and the consent of the daughter not having been obtained, it did not amount to a vested right in the father.

Waters—Pleading—Insufficient to Confer Right—Quiet Title.

4. In a daughter's suit to quiet title against her father, who made a parol gift of the land to her, and against her brother, claiming right to control waters flowing in a ditch, answer of the brother, stating merely that he had the right to use the waters of the ditch for irrigating his lands, *held* insufficient to confer on him any right to the water.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The plaintiff brought this suit against her father, A. B. Conley, and her brother, J. Frank Conley, and their wives, respectively her mother and her sister-in-law, to quiet her title in 80 acres of land in Union County, claiming that her father had given her the tract in 1900, in pursuance of which she and her husband had left their residence on land owned by the latter, had taken possession of the 80-acre tract and had held the same adversely to all other claimants ever since. The mother disclaims all title in the property. The father denied the gift and averred in substance that the plaintiff had occupied the land by his permission, subject to his right to resume possession of the same at his pleasure. J. Frank Conley, answering with his wife, averred the title of his father and that his acts respecting the land were performed only as the father's agent. Claiming that he reserved the right to go upon the premises and make whatever improvements he chose for his own benefit or the betterment of the lands, so long as the plaintiff's use of the same as a residence was not interfered with, the father pleads that at his own expense and without objection from the plaintiff or her husband he constructed a pipe-line on the land for the purpose of carrying water from a spring to

other lands occupied by his son. Specifically revoking the permission which the father says he granted to the plaintiff to use the premises, he prays that he be declared to be the legal owner of the land free from all claim of the plaintiff.

In addition to what has been stated of the brother's answer, that defendant pleads that on June 28, 1918, he became the owner of certain lands adjacent to that in dispute, and then avers:

"That from time immemorial has flowed and now flows in a well-defined channel and ditch from other lands to and across the lands described in the complaint to and upon the hereinabove described lands of defendant J. Frank Conley, a stream of water, and that the waters of said stream are used by defendant on and necessary for irrigating defendant's said lands.

"That this defendant, J. Frank Conley, has the right and is entitled to the use of the waters of said stream for irrigating his land and for stock water thereon, and that it is necessary for him to go along and upon the said ditch and watercourse over the lands described in the complaint for the purpose of cleaning out and repairing said ditch and making necessary repairs thereto for the purpose of conducting water therein to his said land and that prior to the 28th day of June, 1918, he, said defendant, for and in behalf of A. B. Conley, the then owner of the said lands now owned by this defendant exercised the said right for and in behalf of the then owner of said lands and the then owner of the lands described in the complaint, and that, for more than eighteen years prior to the filing of this complaint, the predecessors in title of this defendant have under claim of right and openly and notoriously used said stream through said ditch and stream on the land described in the complaint and under claim of right thereto."

The reply traversed the new matter of the answers except the averments of the relationship of the parties. The Circuit Court heard the testimony on the issues thus framed and rendered a decree for the plaintiff substantially according to the prayer of the complaint. An appeal was taken by the defendants, except the plaintiff's mother, who had a decree for costs on her disclaimer. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. James D. Slater*.

For respondent there was a brief and an oral argument by *Mr. John S. Hodgins*.

BURNETT, J.—The testimony of the plaintiff and of her husband is to the effect that in June, 1900, the father, A. B. Conley, gave to his daughter the tract of land in dispute, in pursuance of which they went upon it, took possession thereof, and used it as her own continuously from that time forward, making sundry valuable improvements thereon. By at least three disinterested witnesses they proved that at about that time and subsequently on different occasions the father told the witnesses that he had given the 80-acre tract in dispute to his daughter, the plaintiff. At the time his testimony was taken, the father was past eighty-two years of age, and, as he admits, his memory was impaired. When his attention was called to the declarations imputed to him by the witnesses, he stated that he had no recollection of making them. He stoutly maintained, however, in general, that he only intended to allow his daughter to live on the land at his pleasure, and that she went there and remained there by his permission under those conditions. The mother says sub-

stantially that such was the intention of herself and her husband. But she does not give any detailed statement of what the father, her husband, who was the owner of the land, said on the subject to the daughter. There is no pretense that the father or anyone for him entered upon the lands and laid the water-pipe or did any other act of the kind prior to the expiration of ten years' possession by the plaintiff.

1. A detailed analysis of the testimony as in argument before a jury would not add anything to the sum of legal knowledge to be preserved in the reports. It is sufficient to say that a careful study of the record convinces us that the Circuit Court was right in its decision on the facts of the case, to the effect that the father made a parol gift of the land to his daughter in June, 1900, at which time she took possession of the property as her own and continued in exclusive occupancy of the same ever afterwards under that gift. This establishes the controlling fact in the case, to wit, a parol gift by the father to the daughter, coupled with her continued adverse holding of the property for nineteen years and more.

In *Allen v. Allen*, 58 Wis. 202 (16 N. W. 610), a father had entered a pre-emption on certain lands in the name of his minor son, then about five years of age. The father continued to occupy the land, the son remaining a member of his family and living there also until some years after reaching majority. It is stated in the opinion that there is no evidence in the case showing that the father asserted any title to the land hostile to the title of his son, unless his possession, use of and improvement of the same for over thirty years is evidence of such assertion of title, until a few months before his death, when he

claimed it in conversation with a third party. In the course of its discussion of the ejectment action brought by the son against one claiming under the father, the court used this language:

“Had there been no evidence in this case bearing upon the question of adverse possession except the fact that the defendant and those under whom she claims had been in the actual possession and use of the land, cultivating and improving the same, having the same assessed as their lands, and paying the taxes thereon, and in other respects using said land as the owners usually do, for more than twenty years before the commencement of the plaintiff’s action, we are of the opinion that the defendant would have been entitled, at least, to have had the question of their holding adversely to the plaintiff submitted to the jury, and, perhaps, to have a verdict directed in her favor.”

The case turned upon the point that the testimony clearly showed that the father admitted the son’s title continuously until a short time before his death.

In *Murphy v. Newingham*, 151 Ky. 360 (151 S. W. 930), the principle is thus stated:

“It is well settled that where there is an unconditional parol gift of a well-defined body of land, accompanied by an actual possession for fifteen years or over, with claim of ownership, such possession ripens into title, and the donor cannot recover the land. If, however, one enters upon land by the owner’s permission, expecting that the owner will give it to him, then such possession is not a hostile holding. * * If the gift was made at that time, then the holding of the plaintiffs was adverse from that moment, and, having held the land for more than fifteen years, their possession ripened into title.”

That was a case where a son sought to enforce an alleged parol gift of land by his father to himself. The law was as stated above, but the facts showed

that no gift was made or intended, and hence the son failed to establish title. These cases are cited from the brief for the defendants, but lately the question was examined at length in *Parker v. Kelsey*, 82 Or. 334 (161 Pac. 694), an almost identical case, in which we reached the conclusion that a parol gift of land is adequate to the initiation of an adverse possession by the donee, which being continued for the statutory period of ten years is sufficient to establish a fee-simple title in the one to whom the gift was made.

2. The fallacy in the argument for the defendants here lies in the apparent assumption that permission is not sufficient to inaugurate an adverse possession. Such, however, is not the true principle, for even the cases cited by the defendants lay down the doctrine that a gift of land by parol, itself permissive in its character and voluntary in its inception, establishes the beginning of an adverse possession. Indeed, if Jones goes upon Brown's land armed with a shotgun, drives off the latter, and remains there in that attitude for ten years, claiming the land as his own, adverse possession is established, accruing upon which is the fee-simple title in the lands. Such, or a similar, display of force, however, is not an absolute requisite; for it is competent for Brown to give the land to Jones by parol, vacating it and allowing the latter to remain there for ten years under those circumstances, with the same result as before. The doctrine the defendant seeks to apply relates to permission merely to occupy and in subordination to the legal title of the one granting the permission. It does not include possession given with design to confer the legal title upon the one who assumes the occupancy.

3. It remains to consider the questions about water, mentioned in the pleadings. As to the diversion of the spring, the defendants plead that A. B. Conley, operating in fact through his agent, the defendant son, went upon the land as owner and laid the pipe-line conducting the water to other premises. This however, according to the testimony, was not done until after the adverse possession of the plaintiff had continued for more than ten years and hence had ripened into a fee-simple title in the latter. If that had been done within the statutory period, it might have constituted an interruption of the continuity of the plaintiff's adverse possession and have so defeated it as a means of acquiring title. The diversion of this water, under those circumstances, however, not having continued for ten years, and the consent of the plaintiff thereto not having been stated in the answer, it does not amount to a vested right in the defendants. In other words, their proof does not show an adverse maintenance of the right in the land of the plaintiff sufficient to establish title in the water by prescription. That is to say, the testimony discloses title to the lands in the daughter by adverse possession at the time the water was diverted, with the deduction that the allegation of the defendants that they went upon their own land and diverted the water is not proved, and with the further deduction that they have not shown title in themselves by adverse use of the water for ten years.

The defendant brother states only conclusions of law in his attempt to control the waters flowing in the ditch mentioned in his answer. The particular language alluded to is this:

“That this defendant, J. Frank Conley, has the right and is entitled to the use of the waters of said

stream for irrigating his land and for stock water thereon and that it is necessary for him to go along and upon the said ditch and watercourse over the lands described in the complaint for the purpose of cleaning out and repairing said ditch," etc.

The pleader does not claim to have appropriated the water within the legal meaning of that term. At best, he indicates only a right as a riparian proprietor. In the syllabus to *Porter v. Pettengill*, 57 Or. 247 (110 Pac. 393), condensing the opinion written by Mr. Justice EAKIN, it is said:

"A complaint to determine the priority of irrigation water rights is insufficient where it does not definitely describe plaintiff's lands, and does not show that any particular land needed irrigation, does not specify the amount of water diverted nor the amount needed to the acre, or for any specific land, and does not show how much water plaintiffs' grantors acquired a right to use; an allegation that plaintiffs were entitled to all the water in a creek during the dry season being too indefinite."

4. Measured by this standard, the answer of J. Frank Conley is insufficient to confer upon him any right to the water in the ditch mentioned. Whatever the attitude of the parties may have been at the time the pipe-line was laid, whether friendly or otherwise, and whether a license grew out of the arrangement or not, are not matters for us to decide in this suit, because there is no pleading upon which such a determination could rest.

It follows that the decree of the Circuit Court must be affirmed.

AFFIRMED.

Argued March 16, reversed and dismissed April 6, rehearing denied June 8, 1920.

TAGGART v. SCHOOL DISTRICT No. 1.

(188 Pac. 908, 1119.)

Constitutional Law—Validity of Statute not Determined Unless Necessary to Decision.

1. Whether the School Tenure of Office Act February 7, 1913 (Laws 1913, p. 69), as amended by Laws of 1917, page 196, is contrary to Article IV, Section 22 of the Constitution, requiring amendments to set forth in full the act or section amended, will not be determined in a proceeding where its determination is not necessary to the decision.

Statutes—All Legislation on Same Subject must be Given Effect.

2. All legislation on the same subject must be taken in *pari materia* and all given effect where possible.

Schools and School Districts—Employment of Teacher must be in Writing.

3. Under Laws of 1913, page 301, Section 1, subdivision 7, authorizing school directors to contract with teachers and requiring them to file such contracts in the office of the district clerk, a contract for the employment of a teacher must be in writing.

Schools and School Districts—Teacher cannot Rely on Apparent Authority of Superintendent to Employ.

4. A school-teacher is presumed to know the law requiring contracts of school directors employing teachers to be in writing, and cannot rely on apparent authority of the superintendent of the district to hire teachers orally.

Schools and School Districts—Teacher not Entitled to Hold Under Tenure of Office Act Unless Employed in Writing.

5. A school-teacher cannot claim the benefit of the Tenure of Office Act (Laws 1913, p. 69), as amended by Laws of 1917, page 196, applying to certain districts only and fixing the tenure of teachers in the employ of school district, unless the contract was in writing as required in all districts by Laws of 1913, pages 301, 304, Section 1, subdivisions 7, 17.

Mandamus—Damages cannot be Allowed Without Allegation in Alternative Writ.

6. Under Section 620, L. O. L., giving pleadings in *mandamus* same effect and the same construction as other pleadings, an applicant for *mandamus* cannot recover damages where there was no allegation in the alternative writ that she had been damaged.

ON PETITION FOR REHEARING.

Schools and School Districts—"Permanent Teachers"—Rights of.

7. In order to give a teacher the rights of a "permanent" teacher under Laws of 1917, page 196, the appointment under which she has been teaching must be, not only valid, but "regular."

Schools and School Districts—One Appointed Substitute not "Regularly" Appointed nor a "Permanent Teacher."

8. One appointed by superintendent of schools as a substitute only to take the place of a regular teacher temporarily, until the regular teacher should recover from her illness or until death should end her employment, was not "regularly" appointed, within the meaning of Laws of 1917, page 197, Sections 4, 5, relating to the rights of permanent teachers.

Schools and School Districts—Substitute Teacher—Termination of Employment—Notice not Necessary.

9. Laws of 1913, page 69, Chapter 37, Section 2 (if still in force), and Laws of 1917, page 197, Section 3, the former relating to classification of teachers and the latter to notice of termination of employment, have no application to substitute teachers temporarily employed.

Schools and School Districts—Appointment of Teacher by Superintendent not "Regularly" Appointed.

10. Laws of 1913, page 301, Section 1, subdivision 7, providing that board shall hire teachers and make contracts, is not inconsistent with Laws of 1917, page 196, and a teacher appointed by the superintendent of a district was not "regularly" appointed, within the meaning of Sections 4 and 5 of the latter act, relating to the listing and rights of permanent teachers; the word "regular," meaning in accordance with the prescribed authority, or, in the absence of prescribed authority, that it is according to the proper and appropriate method of procedure.

Schools and School Districts—Teacher—Irregular Appointment—Ratification Did not Render Teacher "Regularly" Appointed.

11. The fact that the school board, having authority under Laws of 1913, page 301, Section 1, subdivision 7, to make contracts with teachers, accepted the services of a teacher irregularly appointed by the superintendent of the school district, did not render her a "regularly" appointed teacher, within the meaning of Laws of 1917, page 197, Sections 4, 5, relating to the listing and rights of permanent teachers.

From Multnomah: ROBERT TUCKER, Judge.

In Banc.

This is a proceeding in *mandamus* against School District No. 1 of Multnomah County, its board of directors and acting superintendent, to compel the

restoration of the plaintiff to her position and employment as a teacher in the Lincoln High School of that district. From the alternative writ we glean that the plaintiff is a citizen of the United States and of this state, a resident of the district, and at all times mentioned, a teacher of more than twenty years' experience, holding a certificate qualifying her to teach in any of the high schools of the district for the period of five years next after September 7, 1915. It is stated in the writ:

"That for three and one-half annual terms next preceding the 27th day of January, 1919, said plaintiff was continuously employed by said district as a regularly appointed teacher in the science department of the Lincoln High School, one of the schools of said district; that she taught in said position during every session of said school during said period and performed all the duties thereof; and that, at the time of the wrongful dismissal hereinafter mentioned, she was upon the list of permanently employed teachers of said district."

After an allegation about the rate of compensation fixed by the board of directors, it is stated in substance that on January 27, 1919, on her reporting for duty as teacher, the defendants without cause, without notice and without any complaint having been made or filed against her, dismissed her summarily and prevented her from continuing in her position as such teacher. It is alleged and not denied that she has at all times been ready, able and willing to continue in the employment.

A demurrer to the writ by the superintendent was sustained and the proceeding was dismissed as to him. As no appeal has been taken by either party on that branch of the case, it will not require further notice. The demurrer of the district and its

board of directors was overruled and they answered, flatly denying the quoted allegation of the plaintiff's employment, admitting that she was the holder of a certificate as stated in the writ, and otherwise traversing most of the essential allegations of the writ. In substance, the affirmative matter of the answer is to the effect that, in pursuance of a rule promulgated by the board, the superintendent of schools of the district, without further action by the directors, substituted the plaintiff to teach in place of a regularly employed teacher who was incapacitated on account of illness resulting in her death, and that these are the services of the plaintiff named in the writ. The making of the rule and the appointment of the plaintiff by the superintendent to the position formerly occupied by the sick teacher, were admitted by the reply, but the other new matter of the answer was denied except as stated in the writ. The Circuit Court made findings of fact, which, except No. 3 thereof, are substantially in the language of the alternative writ; and as a conclusion of law found that the plaintiff was entitled to a judgment according to the command of the writ, and that in addition thereto she should recover from the defendant as damages the sum of \$800, with interest at the rate of 6 per cent per annum upon installments of \$160 thereof respectively from February 24, March 24, April 21, May 19, and June 16, 1919, until the date of the judgment. From the ensuing judgment the district and its directors have appealed.

REVERSED AND DISMISSED.

For appellants there was a brief over the names of *Mr. Gus C. Moser* and *Mr. Roy K. Terry*, with an oral argument by *Mr. Moser*.

For respondent there was a brief with oral arguments by *Mr. John C. Jenkins* and *Mr. E. T. Taggart*.

BURNETT, J.—This is a proceeding under the act of February 7, 1913 (page 69), passed “to provide for the employment and discharge of teachers, officers, and other employees in school districts now having or which at any time hereafter shall have a population of 20,000 or more persons,” which legislation is commonly known in school circles as the “tenure of office act.” Another statute on this same subject is embodied in Chapter 152 of the Laws of 1917, entitled

“An act to amend Chapter 37 of the General Laws of Oregon for 1913, and to provide for the employment and discharge of all officers, agents and employees, and for the employment, transfer, investigation, trial and discharge of all teachers, classifying of teachers and instructors, creating a nonsalaried commission for the investigation and trial of teachers and instructors in school districts now having, or which shall have a population of 20,000 or more persons.”

1. It is contended by the defendants that the acts of 1913 and 1917 are unconstitutional, in that they do not set forth at full length the act revised or section amended. It is claimed that the first of these enactments is amendatory of Section 4052, L. O. L., subdivision 7, relating to the manner of making contracts with teachers, and the second is a revision of the legislation of 1913, in both of which instances the legislature has not complied with Article IV, Section 22, of the state Constitution relating to the manner of enacting amendments, in that the amendment is not set forth at full length. We do not find

it necessary to consider this branch of the case, and in deference to the co-ordinate branch of the state government, the legislative department, this court, as a part of the judicial department will decline to consider the constitutionality of legislation unless it is necessary to the decision of the case before us.

2. It is an axiomatic principle in the construction of laws that all legislation on the same subject must be taken in *pari materia* and all given effect where possible. This precept is enunciated in the proviso of Section 17 of the act of 1913, where it is said:

“All acts and parts of acts in conflict herewith are hereby repealed. Provided, however, that all general laws of this state relating to public schools shall be applicable to districts under this act except in so far as the same may be in conflict with the provisions hereof.”

In Section 1 of this same act it is said:

“The board of directors of each school district in this state now having or which at any time hereafter shall have a population of 20,000 or more persons shall have the power and authority to appoint and remove, hire and discharge all teachers, officers, agents and employees as it may deem necessary, and to fix their compensation.”

At the same session at which this law was enacted, the legislative assembly passed the act of February 25, 1913 (Chapter 172, Laws 1913), “to provide for the duties and powers of district school boards, including their acts in connection with recurring indebtedness of their districts and funding and re-funding the same, and to repeal Sections 4052, 4053 and 4054 of Lord’s Oregon Laws relating thereto.” In subdivision 7 of Section 1 of that act, treating of the duties of the board of directors, it is said:

“The board at a general or special meeting called for that purpose, shall hire teachers, and shall make contracts with such teachers which shall specify the wages, number of months to be taught, and time employment is to begin, as agreed upon by the parties, and shall file such contracts in the office of the district clerk.”

It is further said in subdivision 17 of the same section:

“Any duty imposed upon the board as a body must be performed at a regular or special meeting, and must be made a matter of record. The consent to any particular measure obtained of individual members when not in session is not an act of the board, and is not binding upon the district. If a contract is made without authority of the board, the individual making such contract shall be personally liable.”

Section 2 of the Tenure of Office Act lays down this definition:

“The word ‘teacher’ or ‘teachers’ as used in this act shall include supervisors and principals and instructors who are in the employ of the school district or districts specified in this act.”

This is amplified in the legislation of 1917 on the same subject, thus:

“The word ‘teacher’ or ‘teachers,’ as used in this act, shall include all supervisors and principals and instructors who are in the employ of the school district or districts specified in this act, and all teachers and instructors are classified, for the purposes of this act, into the following branches of service, to wit: First, supervisors; second, high school principals; third, grade school principals; fourth, assistant supervisors; fifth, heads of departments in high school[s]; sixth, high school instructors; seventh, grade school teachers; eighth, special teachers. All teachers and instructors shall be placed or graded

in one of the foregoing branches of service for all purposes mentioned in this act."

Teachers are further classified by the Tenure of Office Act according to the length of their service. During the first two years thereof, they are known as probationary teachers, after which they are denominated permanently employed teachers. Section 4 of the original act and Section 4 of the act of 1917 are substantially the same, and read that:

"Teachers who have been employed in the schools in any such district or districts as regularly appointed teachers for not less than two successive annual terms shall be placed by the board of directors upon the list of permanently employed teachers."

The third finding of fact to which allusion has been made, reads thus:

"For three and one-half annual terms next preceding the 27th day of January, 1919, said plaintiff was continuously employed by said district as a regularly appointed teacher in the science department of the Lincoln High School, one of the schools of said district; and she taught in said position during every session of said school during said period and performed all of the duties thereof; and, at the time of the wrongful dismissal hereinafter mentioned, she was, by virtue of law, upon the list of permanently employed teachers of said district. Plaintiff was appointed to her position by Superintendent Alderman in September, 1915, during the illness of the teacher in that department, and plaintiff so continued teaching in said department after the death of said teacher, and until plaintiff was discharged. She never signed a contract with said district."

3. Construing subdivision 7 of Section 1 of the act of February 25, 1913, in an opinion by Mr. Jus-

tice HARRIS in *Foreman v. School District No. 25*, 81 Or. 587 (159 Pac. 1155, 1168), it was decided that when the school board hires a teacher a written contract must be made and filed, specifying the wages, number of months to be taught, and time employment is to begin as agreed upon by the parties. This is plainly a reasonable construction of the act, for unless the contract is in writing it cannot be filed in the office of the district clerk, as the act expressly requires. It is said also in *Barton v. School District No. 2*, 77 Or. 30 (150 Pac. 251, Ann. Cas. 1917A, 252), Mr. Chief Justice McBRIDE, delivering judgment:

“It is a principle settled by numerous decisions that where a power is given to a corporation to do an act, and the particular method by which that power is to be exercised is pointed out by statute, the mode is the measure of the power. Here the power or duty to employ teachers is prescribed, and the particular method by which that power shall be executed is also pointed out, and not only is this the case, but the statute adds the mandatory words: ‘Any duty imposed upon the board as a body must be performed at a regular or special meeting, and must be made a matter of record.’ ”

The manifest purpose and spirit of the statute, and the only reasonable construction that can be given it, is that the relation of teacher cannot be created except by a written contract embodying the terms prescribed by the statute. The duty thus imposed upon the board is not delegable. The directors have been elected by the people to perform a duty requiring their judgment. It is not a ministerial function which may be performed by another. The injunction of the statute to the effect that this must be done at a meeting of the board and made a

matter of record, and that the consent of individual members when not in session is not an act of the board and is not binding upon the district, accentuates this principle.

4. The plaintiff had no right to rely upon the action of the superintendent as a basis of service in the capacity of teacher so as to become ultimately one of the permanently employed teachers. A knowledge of the law is imputed to her. There is no such thing as apparent scope of authority in one professing to act as agent for a public municipality of which the powers and their manner of exercise are so strictly and minutely defined by statute. The law prescribes the scope and extent of the authority of those acting for the district, and no one can conceal himself behind the camouflage of apparent authority. If one contracts with another professing to act as agent of the district, it is at the peril of the contracting party. It does not bind the district unless the regular procedure is followed. This is the express command of the statute. As said in *Murphy v. City of Albina*, 22 Or. 106, 114 (29 Pac. 353, 356, 29 Am. St. Rep. 57):

“A sufficient answer to the suggestion that the conclusion we have reached works a hardship upon plaintiff, who in good faith performed the extra work, supposing that the persons who directed it to be done were authorized to do so, is, that every person dealing with the agents of a municipal corporation must at his peril see that such agents are acting within the scope of their authority and line of their duty, and if he make an unauthorized contract he does so at his own risk. The courts cannot disregard the well-settled rules of law in order to avoid an apparent injustice in a particular case.”

5. Viewed in the light of the statute, the third finding of fact is self-contradictory. In the first part

it declares that the plaintiff was continuously employed by said district as a regularly appointed teacher. In the latter part it says that she was appointed by the superintendent during the illness of the teacher in that department, and concludes by saying: "She never signed a contract with said district." If she was appointed by the superintendent either orally or in writing, she was not a "regularly appointed teacher," because that is not the formula prescribed by the statute. It is only a "regularly appointed teacher" who is entitled to the benefit of the Tenure of Office Act. But, whatever construction we may place upon this finding of fact, the statement that she did not sign a contract with the district, but was only appointed by the superintendent, works out the result that the finding of fact does not support the judgment. Called upon to prove the disputed allegation of the writ that she was continuously employed by the district as a regularly appointed teacher, she failed to produce the only evidence recognized by the statute, to wit, a written contract with the directors entered into at a meeting of the board. At her peril she depended upon her transactions with the superintendent, who really had no authority and if he had, could not and did not exercise it as the law requires.

6. There was no allegation in the writ about any damages suffered by the plaintiff on account of the conduct of the defendants. It is said in Section 620, L. O. L.:

"The pleadings in the proceedings by *mandamus* are those mentioned in Sections 618 and 619, and no others are allowed. They are to have the same effect and to be construed and may be amended in the same manner, as pleadings in an action."

Further, in the following section, it is said:

“If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained by reason of the premises, to be ascertained in the same manner as in an action, together with costs and disbursements, and a peremptory *mandamus* shall be awarded without delay.”

It is well nigh a platitude to say that without an allegation of damages no judgment therefor can be supported. The award of damages in this instance was a pure gratuity and cannot be sustained in any view of the case.

Except in 1870, there has not been a session of the legislative assembly which has not promulgated some statute relating to the public schools, and it would seem that at some time the manner of their administration would be settled. But however that may be, no law has abolished the principle that one desiring to enjoy the benefit of a legislative enactment must comply with its terms and conditions. The statutes have prescribed the door by which the teacher may enter upon the path which ultimately leads to the position of permanent employment. Paraphrasing the Scriptures, we may say that he that entereth not by this door, but climbeth up some other way, the same is not entitled to *mandamus* installing him as a permanently employed teacher.

The conclusion is that the judgment must be reversed and the writ of *mandamus* dismissed.

REVERSED AND DISMISSED.

McBRIDE, C. J., and JOHNS, J., were not present at the hearing of this case.

Rehearing denied June 8, 1920.

PETITION FOR REHEARING.

(188 Pac. 1119.)

On petition for rehearing. REHEARING DENIED.

Mr. John C. Jenkins and Mr. E. T. Taggart, for the petition.

Mr. Gus C. Moser and Mr. Roy K. Terry, contra.

BENNETT, J.—The facts in this case are fully stated in the original opinion of Mr. Justice BURNETT. A petition for rehearing is presented, accompanied by a very earnest and able brief, in which it is strongly urged that, however irregular the plaintiff's appointment as a teacher may have been, it was sufficient, after her services were accepted, to make her employment valid and effectual.

7. This view, however, overlooks the real controlling element in the case, which is that the appointment of the plaintiff, under which she has been teaching, must be not only valid, but "regular," in order to bring her within the law and give her the rights of a *permanent* teacher.

Section 4 of the act in question (Laws 1917, p. 197), provides:

"Teachers who have been employed in the schools * * as *regularly appointed teachers* * * shall be placed * * upon the lists of permanently employed teachers."

And it is such teachers, and such only, whose continued employment is perpetuated by the succeeding Section 5. These words, "regularly appointed," mean something. They are a limitation upon the

class of teachers whose tenure comes under the protection of the statute. It is not every teacher who may be employed by the district, but only those who were "regularly" appointed who share in its favors in this regard.

8. The question therefore is: Was the plaintiff *regularly* appointed? We think she was not. In the first place, she was never appointed or even employed as a regular teacher at all. She was appointed by the superintendent as a substitute only, to take the place of a regular teacher temporarily, until the permanent teacher should recover from her illness or until death should end her employment.

Miss Heath, the regular teacher, seems to have never been discharged. She seems to have remained upon the permanent roll. If she had recovered at any time, she would no doubt have claimed her place. If she had recovered in a week, or a month, the plaintiff would hardly have claimed a permanent right to her place, and the fact that she remained sick a long time, and finally died, can make no difference in principle, or in the permanent rights of the plaintiff.

9. Section 2 of the act of 1913 (Chap. 37), (if it is still in force) and Section 3 of the act of 1917 (Chap. 152), have no application to substitute teachers temporarily employed. The former is a mere classification of teachers, with reference to the character of their work, and the latter has plain reference to teachers regularly employed. To construe this latter clause, as referring to substitute teachers, would lead to absurd results. If we gave it that construction, it would follow that a substitute teacher, employed to take the place of another teacher for a week or a day, could not be discharged,

when the regular teacher reported for duty, without two and one-half months' notice, and then only at the close of the school year. The result would be that the district would, towards the end of the year, have many more teachers than positions, and would be compelled to pay these extra teachers for a long term of doing nothing. It is obvious that the legislature never intended such a result.

Neither was the *manner* of plaintiff's employment "regular," within the meaning of the statute. When we speak of any act of any officer or incorporated body being "regular," we mean that it is in accordance with the prescribed authority, or in the absence of prescribed authority, that it is according to the usual and appropriate methods of proceeding. And this is in accordance with the dictionary definition of the word.

One of the definitions given in the International Dictionary is:

"Selected, conducted, made, etc., in conformity with established or prescribed usages, rules or discipline."

And this, we think, was clearly the sense in which the word "regularly" was used in the legislative act in question. In the matter of employing teachers, the regular manner of their employment is in this state prescribed by statute. Section 7 of Chapter 172 of the Laws of 1913, provides:

"The board * * shall hire teachers and shall make contracts with such teachers, which shall specify the wages, number of months to be taught * * as agreed upon by the parties."

This was a re-enactment of subdivision 7 of Section 4052 of the Code, which was enacted in 1905.

10. This law was not and is not in any way inconsistent with the provisions of the act of 1917, and is not repealed thereby, and clearly applies to all districts, whether the population is greater or less than 20,000. Under this provision the regular way to appoint a teacher was by a written contract, executed at a meeting of the board, which contract should provide for the length of the employment. Any other employment was at least irregular, if not wholly void, and would not of itself, place the teacher upon the permanent list.

11. The brief of this petitioner urges very strenuously that, even if the appointment of the plaintiff was irregular, yet that it was not entirely void, and that it could be and was ratified by the acceptance of plaintiff's services, and many authorities are cited to support the contention that after she had taught, and the district had accepted her services, she could recover for the same, upon the theory that the contract was ratified by the district. Even if we assume that this is the law, it would not help the plaintiff in this proceeding, for she would still not be a "regularly" appointed teacher. There are many irregular acts and proceedings which are still valid—or may be made valid—validity is one thing, regularity quite another. The legislature has chosen to make regularity, not validity, the test.

As was indicated by Mr. Justice BURNETT in the original opinion, plaintiff entered upon her employment by a special door, and not by the regular one. If she had demanded and obtained a contract in the regular way, when she entered upon this employment, it would no doubt have shown that she was employed as a substitute, and temporarily only, until the recovery of Miss Heath. No blame whatever

attaches to her for having taken employment as she did, but she ought not now to claim more than she would have had, had she obtained her employment in the regular way prescribed by the statute.

The petition for rehearing is denied.

REVERSED AND DISMISSED. REHEARING DENIED.

Argued March 31, affirmed April 20, rehearing denied June 8, 1920.

FIRST NAT. BANK OF SHERIDAN v. YOCOM.

(189 Pac. 220.)

Chattel Mortgages—Allegation Defendant Mortgagor "Retains" Possession Means He "Detains."

1. In action by chattel mortgagee for possession, allegation of complaint that defendant "retains" possession of personalty means same thing as allegation he "detains" it.

Chattel Mortgages—Judgment in Action for Possession Sufficiently Describing Property.

2. In action for possession by chattel mortgagee, mortgage and complaint definitely describing property, judgment for plaintiff, which, after reciting a list of the chattels, refers to the complaint, the description of the personalty being sufficiently definite to enable the sheriff to execute the writ, is sufficient in its description of the property.

Sales—Conditional Seller Entitled to Resell for Buyer's Account and Take Possession of Mortgaged Chattels.

3. Conditional seller of tractor by taking possession, selling for buyer, and crediting proceeds on conditional sales note, under the contract did not evidence intention to rescind, but treated contract as in force, though broken by buyer, and is entitled to take possession of chattels mortgaged to it by buyer as additional security, and to hold as compensation for breach of contract.

Sales—Conditional Seller Entitled to Recover Balance After Crediting Proceeds of Resale.

4. One remedy in a contract for sale with reservation of title until payment is right on buyer's default to seize and sell property and apply proceeds on price; and, where seller exercises right, he is entitled to recover from buyer any balance remaining after crediting proceeds of sale.

[As to election of remedies on breach of conditional sale, see notes in 1 Ann. Cas. 268; 16 Ann. Cas. 1057; Ann. Cas. 1917D, 464.]

Sales—Conditional Sale Sufficient Consideration for Promise to Pay Price.

5. Conditional sale contract, giving possession and use of goods to buyer while title remains in seller until full payment, affords sufficient consideration for buyer's absolute promise to pay price.

From Yamhill: HARRY H. BELT, Judge.

Department 1.

Plaintiff brings this action for the possession of certain personal property described in a chattel mortgage. The cause was tried by the court without the intervention of a jury. Findings of fact and conclusions of law were made, and a judgment was rendered thereon in favor of plaintiff for the possession of the property or the value, \$1,000. Defendants appeal.

Plaintiff alleges special ownership in the personal property in question by virtue of a chattel mortgage executed by defendant H. A. Yocom in favor of plaintiff on February 4, 1918, to secure the payment of two certain promissory notes executed by defendant Yocom, one for \$600 and another for \$2,300, and sets forth the conditions of the chattel mortgage which was duly recorded; that the conditions of the mortgage have been broken and plaintiff has demanded of defendants the possession of the personal property; and that the said defendants now unlawfully retain possession of the personal property in Polk County, Oregon, to plaintiff's damage in the sum of \$755, the reasonable value of chattels.

On the same date the plaintiff delivered to the defendant one Nelson tractor described in one of the notes, which reads as follows:

“\$2300.00. Sheridan, Oregon, Feb. 4, 1918.

“On or before demand, I promise to pay to the order of First National Bank of Sheridan, Oregon,

at their office in Sheridan, Ore., twenty-three hundred dollars, with interest from date at the rate of 10 per cent per annum, payable annually, and if not so paid when due to become as principal and both principal and interest to bear — per cent interest.

“The express conditions of the contract for the sale and purchase of the one Nelson Tractor, being the tractor shipped from Eastern Oregon to Portland by C. H. Brooks, for which this note is given, is such that the title and ownership is expressly retained in the said First National Bank of Sheridan, Oregon, until this note is paid in full; That the First National Bank, Sheridan, Oregon, has full power to declare this note due and take possession of said property above described at any time they may deem themselves insecure, even before the maturity of the note and sell the same at private sale and endorse the proceeds less the amount of all expenses on this note, appraisement and stay of execution waived. The makers and endorsers of this note expressly waive demand, notice of non-payment and protest.
“H. A. Yocom.”

In June, 1918, the defendant Yocom becoming involved and unable to carry on his farm, plaintiff recovered possession of the tractor and sold the same pursuant to the conditions of the contract for the sum of \$1,250 which was indorsed on the conditional sales note.

Defendant Yocom also paid the bank \$440.68, the proceeds of certain hogs described in the chattel mortgage which was credited upon other notes held by plaintiff against Yocom. Defendant Yocom also made other payments to plaintiff amounting to \$190. On September 11, 1918, Yocom being indebted to defendant Broadmead Farm Company, executed to it a bill of sale of the personal property in question.

The defendants by their answer and upon the trial claimed that the \$600 note had been satisfied in

full by the proceeds of the sale of the hogs and the payment of \$190; and that plaintiff by taking possession of and selling the tractor elected to treat the conditional sales note for \$2,300 as rescinded, and is not entitled to recover the balance after crediting the proceeds of the sale of the tractor.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Frank Holmes* and *Mr. Roy Sparks*, with an oral argument by *Mr. Holmes*.

For respondent there was a brief and an oral argument by *Mr. W. O. Sims*.

BEAN, J.—1, 2. It is assigned that the court erred in entering judgment for plaintiff, in that the complaint is insufficient and does not allege that the defendant “detains” the personal property described in the complaint. The language of the pleading is that the defendant “retains” possession of the personal property, which means the same thing. Error is also predicated upon the insufficiency of the description of the property in the judgment. The chattel mortgage and complaint definitely describe the property. The judgment, after reciting a list of the chattels, refers to the complaint. The description of the personalty is sufficiently definite to enable the sheriff to execute the writ. The point is not well taken.

The main question in the case is in regard to the conditional sales contract. The contention of defendants is that the retaking of the tractor constituted an election of remedies by it, and precludes plaintiff from further remedy under the terms of the note. Defendants cite *McDaniel v. Chiarmonte*,

61 Or. 407, 408 (122 Pac. 33). The opinion in the latter case, at page 408, simply refers to the rule contended for by defendants as applicable to some forms of conditional sales, and then states the four remedies of a seller which he has under varying circumstances by virtue of a conditional sales contract, mentioned in 1 Mechem on Sales, Section 615, the second of which is as follows:

“He may treat the contract as in force, but broken by the buyer, and, if by the transaction the buyer contracts to pay, the seller may retake the goods and recover damages for the breach.”

In such case the measure of damages will ordinarily be the difference between the contract price and the market value of the goods at the time and place of default: 1 Mechem on Sales, § 615.

3. In the instant case the facts come clearly within the second remedy mentioned. The plaintiff by taking possession of the tractor and selling the same for the buyer and crediting the proceeds on the conditional sales note, under the terms of the contract, did not evidence an intention to rescind the contract but treated it as in force, although broken by the buyer. The defendant Yocom having absolutely agreed to pay the price \$2,300 and given additional security therefor, that of the chattel mortgage, the seller is entitled to take possession of the chattels so mortgaged and hold the same as compensation for the breach of the contract: *McDaniel v. Chiarmonte*, 61 Or. 407, 408 (122 Pac. 33); *Herring-Marvin Co. v. Smith*, 43 Or. 315, 321 (72 Pac. 704, 73 Pac. 340); *Francis v. Bohart*, 76 Or. 1, 5 (143 Pac. 920, 147 Pac. 755, L. R. A. 1916A, 922); *Pelton Water Wheel Co. v. Oregon Iron Co.*, 87 Or. 248 (170 Pac. 317); *Miles v. Sabin*, 90 Or. 129, 136 (175

Pac. 863); *International Harvester Co. v. Bauer*, 82 Or. 686 (162 Pac. 856). In the latter case there was a conditional sales contract similar to the one in question. The seller seized the personal property for sale in accordance with the terms of the contract and a chattel mortgage upon the same property executed at the same time, and proceeded to foreclose a real estate mortgage contemporaneously executed to secure payment of the threshing-machine and engine which were the subject of the conditional sale. The foreclosure was upheld in an exhaustive opinion by Mr. Justice BENSON.

4. The rule followed in this state is in effect that: where one of the remedies provided in a contract for the sale of property containing a reservation of the title in the seller until payment of the purchase price, is the right on default of the buyer to seize and sell the property at public or private sale and apply the proceeds toward the payment of the purchase price, and the seller exercises this right, he is entitled to recover from the buyer any balance remaining after so crediting the proceeds of the resale: See, also, *Christie v. Scott*, 77 Kan. 257 (94 Pac. 214); *Van Den Bosch v. Bouwman*, 138 Mich. 624 (101 N. W. 832, 110 Am. St. Rep. 336); *Warner v. Zuechel*, 19 App. Div. 494 (46 N. Y. Supp. 569); *Ascue v. C. Aultman & Co.*, 2 Tex. App. (Civ. Cas.) 441; *McPherson v. Acme Lbr. Co.*, 70 Miss. 649 (12 South. 857); *Dederick v. Wolfe*, 68 Miss. 500 (9 South. 350, 24 Am. St. Rep. 283); and note, L. R. A. 1916A, 919.

The rule adopted in this state upholds the contract of conditional sale as made by the parties themselves. While in some instances the rule may work

a hardship upon the buyer, on the other hand where personal property is sold under such a contract, and on account of the leniency of the seller in enforcing payments the property has deteriorated, where the same is machinery, as in the case at bar it might be worn out and practically worthless, the seller would receive practically no compensation therefor if the rule contended for should be applied. This would tend to render it difficult for people to obtain credit and purchase property under such conditional contracts.

There are numerous forms of conditional sale contracts which have apparently caused many divergent opinions relating to questions arising thereunder. Many such contracts of sale provide that on default of the buyer the seller may take possession and sell the property on account of the buyer, crediting him with the proceeds of the resale, and hold him liable for any deficiency in the price. As a general rule, the validity of such a stipulation is given full effect by the courts, and the seller is held entitled, after a resale in accordance with the provisions of the contract, to sue and recover any balance remaining after crediting on the purchase price the proceeds of such sale. This effect has been given to a stipulation authorizing the seller to retake possession and resell, as this necessarily implies that the resale shall be on account of the buyer and that any deficiency towards the satisfaction of the price shall be paid by the buyer: 24 R. C. L., p. 493, § 786; *Madison River Livestock Co. v. Osler*, 39 Mont. 244 (102 Pac. 325, 133 Am. St. Rep. 558).

5. A contract of conditional sale, giving possession and use of the goods to the buyer while title remains in the seller until full payment, affords a sufficient

consideration for the buyer's absolute promise to pay the agreed price: *Kilmer v. Moneyweight Scale Co.*, 36 Ind. App. 568 (76 N. E. 271); 35 Cyc., p. 654, note. The construction to be placed upon a conditional sales note and contract depends upon the terms thereof, and no fast rules can be laid down to affect such instruments.

Objection is made to the application by plaintiff of the proceeds of the sale of other personal property, and it is claimed that it should have been applied upon the \$600 note. We do not deem this material in the present case, as in any event the balance remaining due on the conditional sales note would exceed the value of the property in question. Defendant Yocom acquiesced in the application made of the proceeds and under the circumstances it could not affect the defendant Broadmead Farm Company.

The question considered was raised by defendants' counsel by a motion for a nonsuit interposed at the appropriate time, and in other ways upon the trial of the cause. There was no error in overruling the motion for a nonsuit and finding in favor of plaintiff. The judgment of the lower court is therefore affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued March 24, affirmed April 20, rehearing denied June 8, 1920.

HOWARD v. FOSKETT.*

(189 Pac. 396.)

Trusts—"Express Trusts" and "Implied Trusts" Defined.

1. "Express trusts" are such as are created by the deliberate or intentional act of the settlor, and "implied trusts" are trusts which without such voluntary acts arise out of the transactions of the parties by operation of law.

Trusts—Complaint Seeking to Establish Trust Held Founded on Express Trust.

2. A complaint, alleging that land was conveyed by a husband to a third person and by the third person to the husband and wife as tenants by the entirety, and that in consideration of the execution of such deeds the wife verbally promised the husband that if she survived him she would convey the land to his children by a former marriage, reserving a life estate to herself and seeking to establish a trust in the land, was founded upon an express trust alleged to have been created by parol agreement.

Trusts—Express Trust in Land cannot be Proved by Parol Evidence.

3. Under Section 804, L. O. L., providing that no estate or interest in real property other than a lease for not exceeding one year nor any trust or power concerning such property can be created, transferred, or declared otherwise than by operation of law or by writing, parol evidence is inadmissible to establish an express trust in land.

Trusts—Trust Held not Sufficiently Declared by Letter.

4. Where it was claimed that a wife in consideration of the conveyance of land to herself and her husband as tenants by the entireties agreed in case she survived the husband to convey it to his children reserving a life estate, a letter written the husband of one of the children, stating that she was not in a position to know "what arrangement could be made protecting my life interest in the properties as well as my personal equity therein," and that she must have the advice of counsel and would then communicate with him, was not a sufficient declaration of trust.

[As to sufficiency of evidence to establish constructive or resulting trust, see notes in Ann. Cas. 1916D, 1194.]

From Lane: GEORGE F. SKIPWORTH, Judge.

*On grantee's oral promise to grantor or person furnishing consideration for conveyance, to hold in trust as giving rise to constructive trust, see note in 39 L. R. A. (N. S.) 906. REPORTER.

Department 2.

This is a suit wherein it is sought to establish and declare a trust in certain real property. The complaint alleges that on October 20, 1913, W. H. Abrams and Alice, his wife, conveyed the real estate therein described to one Sanford, who on the next day executed a deed reconveying the same property to Abrams and wife jointly. It is alleged that these conveyances were made by the husband and wife, and Sanford, for the purpose of creating an estate in entirety, and upon the express verbal agreement between Abrams and his wife that, in the event that she survived her husband, she would convey the property to the three children of W. H. Abrams by a former wife (such children being the plaintiff Minnie S. Howard and the defendants Thomas C. Abrams and Grace McClellan), reserving to herself a life estate therein. It is claimed that at the time of such conveyances, W. H. Abrams was in poor health, weak in both body and mind, and that in the transactions, he yielded to the undue importunity of his wife, who, acting with the fraudulent purpose of securing the property for herself, had no intention of performing the parol promises which she then made. Thereafter, on November 9, 1915, W. H. Abrams died. The relief sought is, that defendant Alice S. Foskett, the surviving widow of W. H. Abrams, be decreed to be "a trustee to carry into execution her verbal promises made to said W. H. Abrams, deceased; that the deeds recorded in pages 348 and 349 of book 102 of the Deed Records of Lane County, Oregon, be canceled," and that the three children be declared the owners as tenants in common of the property described in the com-

plaint, subject to the life estate of Alice S. Foskett therein.

The answer of the defendant, Alice S. Foskett, admits the execution of the deeds in question, but denies the alleged trust agreement, and the exercise of any influence by her in securing the same. It is then recited affirmatively, that, at the time of their marriage, W. H. Abrams had very little capital, and that the wife, having received an inheritance of more than \$3,000, contributed the same for use in her husband's business, and from then until the death of the husband, in addition to the performance of her household duties, she earned considerable money as a music teacher, and contributed the same to the common fund and for the support of the family. It is asserted that, being influenced by the foregoing fact, W. H. Abrams, of his volition, solicited his wife to join with him in conveying the property to Sanford, for the purpose of having Sanford reconvey to them jointly, thereby giving each an estate in entirety. It is further alleged that since the death of her husband, she has paid taxes and street assessments and her husband's debts from her separate funds, relying upon her ownership of the real property as the survivor under the joint deed.

The reply alleges that the money contributed by the wife as alleged in her answer, was simply a loan upon which she regularly received interest. A trial being had, there was a decree for the defendant Alice Foskett, from which plaintiffs appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. H. E. Slattery*.

For respondents there was a brief over the names of *Mr. C. A. Hardy* and *Mr. J. S. Medley*, with an oral argument by *Mr. Hardy*.

BENSON, J.—In the consideration of the questions involved herein, certain undisputed facts should be kept in mind. W. H. Abrams and the defendant, Alice S. Foskett, were married in 1878, and at the time of his death had been husband and wife for a period of about thirty-seven years. When the wedding occurred, the husband had three small children by a former wife. These children grew to maturity in their father's home, from which, prior to the execution of the joint deed in controversy, they had married and established homes of their own. The domestic life of Abrams and his wife appears to have been exceptionally happy. At the outset, the husband's resources were small, and the addition of the wife's funds was a marked reinforcement of his working capital and doubtless had a large influence upon their subsequent prosperity. The wife was a skilled musician and added to the family income by her services as a teacher of music. At the time of the marriage she received from her parents a gift of \$1,000, and subsequently received from their estate, according to her testimony, an additional \$3,000, all of which was used by Abrams in his business. There is some evidence tending to prove that the latter sum may have been not more than \$2,000, and there is some evidence to the effect that her husband paid her interest on these sums. The evidence fails to establish the assertion that the deeds were executed because of the wife's importunities or that the husband was then mentally weak.

It is the contention of defendant that the complaint is founded upon allegations of an express trust, and that therefore parol evidence is not admissible to establish its existence. The allegations of the complaint upon this subject are as follows:

“That, on October 21, 1913, for the consideration hereinafter expressed, the said Lorenzo Sanford conveyed all of the said real estate to the said W. H. Abrams and Alice S. Abrams, husband and wife, and that it was agreed and understood by and between the said W. H. Abrams and Alice S. Abrams, that if she survived the said W. H. Abrams, she would convey the said real estate to the said Minnie S. Howard, Thomas C. Abrams and Grace McClellan reserving unto herself a life estate in and to the said real estate.

“That, in consideration of the execution of the said two deeds, the said Alice S. Abrams, now Alice S. Foskett, verbally promised the said W. H. Abrams, deceased, that if he died first she would convey the said real estate unto his said three children above named, reserving unto herself a life estate therein.

“That, in reliance upon the said verbal promise of the said Alice S. Foskett and believing the same to be true, and in consideration thereof, the said W. H. Abrams consented to the execution of the said two deeds.”

1. “Express trusts are such as are created by the deliberate or intentional act of the settlor, and implied trusts are trusts which, without such voluntary acts, arise out of the transactions of the parties by operation of law”: 1 Beach on Trusts and Trustees, 45.

2, 3. Applying this definition, the complaint is clearly founded upon an express trust, which it is alleged was created by a parol agreement between the parties. This being true, the evidence requisite

to establish a trust under the joint deed is governed by Section 804, L. O. L., which reads thus:

“No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law.”

Speaking of this section, in the case of *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 295), Mr. Justice MOORE says:

“The rule is universal that a parol declaration of a trust will not affect the land, and for this reason parol evidence is inadmissible to establish such a trust. In *Fairchild v. Rasdall*, 9 Wis. 379, the court, speaking of the universality of this rule, say: ‘We do not feel called upon to cite authorities to show that, in the absence of fraud, accident or mistake, parol evidence cannot be received to prove that a deed, absolute on its face, was given in trust for the benefit of the grantor.’ ”

In *Karr et al. v. Washburn et al.*, 56 Wis. 303 (14 N. W. 189), under a statute which is practically identical with ours, the court says:

“Whatever may be the language of the courts, perhaps of this court, in some of the cases, such a trust is not an absolute nullity. It is simply void at the election of the trustee. He may execute it or not, as he chooses, and the courts will not interfere to compel him to execute it or to refrain from so doing. If he refuses to execute it, from thenceforth the trust, which rests only upon a moral obligation, is a nullity.”

But it is urged by plaintiffs in the present case, that there is such fraud disclosed in the transaction as withdraws the matter from the operation of the

statute. The only allegation of fraud found in the complaint is to the effect that Alice S. Abrams did not intend to perform her promise when she made it. It is true that in a few cases the making of a promise, with the present intention of disregarding it, is sufficient evidence of fraud, yet the obstacles presented to an effort to prove what the intent of a party might have been at the time of making a promise, renders such authorities of doubtful value, and in the present case we have searched the evidence in vain for anything upon which to predicate a finding of such fraud.

4. It is also urged that a certain letter written by Mrs. Foskett sufficiently declares the trust. This letter, evidently written in response to a letter from her stepdaughter's husband, is as follows:

"Salem, March 8, 1916.

"Dear Charlie: In regard to your request for an arrangement of affairs, I am not as you realize in a position to know what arrangements could be made protecting my life interest in the properties as well as my personal equity therein, consequently I will be obliged to have the advice of counsel before making a reply to your letter. As soon as I have received the necessary advice I will communicate with you. The weather has been very disagreeable for over a week.

"Sincerely yours,

"(Signed) ALICE S. ABRAMS."

This letter falls very far short of stating or acknowledging the terms of a trust, and drives the plaintiffs back upon parol evidence to explain what she is talking about.

It follows that the decree must be affirmed, and it is so ordered. AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BENNETT and JOHNS, JJ., concur.

Argued April 4, reversed and dismissed April 27, rehearing denied June 8, 1920.

GILES v. ROSEBURG.

(189 Pac. 401, 1119.)

Municipal Corporations—Property to be Assessed Need not be Described in Initiatory Proceedings.

1. Under City of Roseburg Charter, Sections 73, 115, property to be assessed for a proposed sewer not abutting upon the sewer need not be described in the initiatory proceedings and the owners then notified that their property would be assessed; notice at the assessment stage of the proceeding giving owners opportunity to be heard before assessments are actually made being sufficient.

Municipal Corporations—Map Showing Property Benefited not Necessary.

2. Under City of Roseburg Charter, map by city engineer showing property to be benefited by sewer improvement is not necessary to the validity of the proceedings, however proper and fitting that such a map be kept on file.

Municipal Corporations—Property, Though not Abutting on Sewer, may be Assessed.

3. It is not necessary in order to justify an assessment upon property that it actually abuts upon the sewer or be at the time connected therewith.

[As to property subject to special sewer assessment, see notes in Ann. Cas. 1915D, 384.]

Municipal Corporations—Finding of City Council as to Benefits Conclusive.

4. Whether property was benefited by sewer is a question of fact upon which the finding of the city council is conclusive, except under special conditions.

PETITION FOR REHEARING.

Municipal Corporations—Sewer District Created—Notice—Property Benefited—Resolution of Intention to Construct Sewer.

5. Council of City of Roseburg was not required to create and define sewer district, or give notice of the property benefited, at time of passing resolution of intention to construct sewer, and was not required to specify in such resolution the property benefited, notwithstanding Roseburg City Charter, Section 111, requiring city engineer or surveyor to file "plans and specifications for an appropriate sewer or drain," and providing that the council "shall declare" its purpose to construct said sewer or drain describing the same and the location thereof; such provision having reference to plans and specifications, and the location of the sewer itself, and not of the district.

From Douglas: JAMES W. HAMILTON, Judge.

Department 2.

This is a suit brought by the plaintiff against the City of Roseburg to quiet title to certain lots in said city, and to enjoin the city from asserting and enforcing the lien of certain assessments made by the city, for the purpose of putting in a short piece of sewer in Flint's Addition to said city.

The plaintiff's property is not in Flint's Addition, but in West View Addition to the city. West View Addition joins Flint's Addition, and the nearest portion of the property in dispute is about one block and across two streets, from the sewer in question.

The city council, when it initiated the improvement, passed a resolution, as follows:

"Be it Resolved by the Common Council of the city of Roseburg that it is expedient and necessary to construct sewers at the following places in the city of Roseburg, for the relief of the property in the vicinity thereof, to wit: A 16-inch sewer on the south side of Lane Street to connect with the present 16-inch sewer on Lot 7, Block A, Flint's Addition, with the end of the 16-inch sewer on Lot 11, Block A, Flint's Addition; also a 14-inch sewer line from the west end of Lot 1, Block E, Flint's Addition, running in a westerly direction across Glen Street through Lots 11, 10, and 9 of Block A, Flint's Addition, to the intersection with the new 16-inch pipe above mentioned; that the city engineer be and he hereby is instructed to prepare plans, specifications and estimates for the proposed sewers and file the same in the office of the city recorder."

It did not at that time designate the property to be benefited and assessed by said improvement. The city engineer filed certain plans and specifications for the sewer, and there is introduced in

evidence by the city, with those plans, a map purporting to show, colored in yellow, the lots and property to be assessed for the construction of the sewer. The property, belonging to plaintiffs and in question here, is included in this map. The map purports to have been filed on September 6, 1916, the same day as the other plans; but the plaintiff makes a question as to whether it ever was really filed or kept on file in the recorder's office. Plaintiffs claim to have asked for it at the recorder's office, and that they were told there was no such plat; but about this, there is a conflict in the evidence.

On the eleventh day of September, 1916, the following resolution was adopted:

"Resolved by the Common Council of the City of Roseburg, that it is expedient and necessary, and the Council hereby proposes to construct a sewer in Block "A" Amended Plat of Flint's Addition to the City of Roseburg, Oregon, according to the plans, specifications and estimates of the City Engineer filed in the office of the City Recorder on the 6th day of September, 1916, which said plans and specifications and estimates are hereby approved and adopted.

"The entire cost of said sewer, including the cost of engineering, advertising, abstracting and clerical help in making the assessment, shall be assessed upon the property especially benefited thereby, as provided by the Charter of the City of Roseburg, and no part thereof shall be paid by the city.

"The estimate of the City Engineer of the probable detailed cost of said sewer is the sum of \$750.24.

"Resolved that the City Recorder be and he is hereby directed to give notice of said proposed improvement, as provided by the Charter of the City of Roseburg."

Thereafter, the evidence shows that a notice, containing the above resolution, and continuing:

“Remonstrances against said proposed sewer construction may be made in writing to the common council and filed with the City Recorder within twenty days from the date of the posting of this notice”

—was posted by the recorder in three public places, as required by law. After the expiration of the 20 days, the city passed an ordinance providing for the construction of the sewer in accordance with the plans and specifications. This ordinance did not otherwise describe the property to be benefited and assessed, but contained the following provision:

“That the Common Council proceed, as by law required, to construct said sewer, and to ascertain and determine the cost thereof, and to assess each lot or part of lot, or other property especially benefited thereby, its share of such cost.”

Thereafter, notice for bids was advertised and the contract let and the sewer constructed.

Still later, a schedule of the proposed assessment, describing the property to be assessed and the amount of each assessment, and describing, among others, the property in question here, duly assessed to the plaintiffs, was filed with the recorder, and notice was published setting forth said assessments, and calling for objection, if any, within 15 days from the posting of the notice.

Thereafter there was a remonstrance by the plaintiffs and other property owners, which was referred to a committee, who reported against the same.

After the filing of such report, the city council passed an ordinance making the assessment in question, and declaring it a lien upon the property. The

plaintiffs attack the proceedings upon the ground that the original resolution, declaring the expediency of the construction of the sewer, and the subsequent resolution, approving and adopting the plans and specifications of the engineer, did not describe the property of the plaintiffs, which was afterward assessed, and did not give them any notice that such property would be involved in the proceedings.

REVERSED AND DISMISSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Carl E. Wimberly* and *Mr. Ira B. Riddle*, with an oral argument by *Mr. Wimberly*.

For respondents there was a brief and an oral argument by *Mr. B. L. Eddy*.

BENNETT, J.—The only question presented in this case is whether or not, under the provisions of the charter of the City of Roseburg, the property to be assessed for a proposed sewer—where it does not abut upon the sewer, as in this case—must be described in the initiatory proceedings, and the property owners notified then, that their property would be assessed for its construction.

The provisions of the charter, which are pertinent to this controversy, are as follows:

“The Council shall have power and it is hereby authorized whenever it may deem that the public health, interest or convenience may require, to construct or repair and lay down all necessary sewers and drains of a character and capacity to provide a complete system of sewerage, together with all necessary manholes, catch-basins, and branches, and to levy and collect an assessment upon all lots and parts thereof and parcels of land especially benefited by such sewers and drains to defray the whole

or any portion of the cost and expenses thereof, and to determine what lands are especially benefited by such sewer, and the amount to which each lot or part thereof or parcel of land is benefited; and the determination of the Council concerning the construction of any payment for any sewer or drain shall be final.

“Whenever the Council shall deem it expedient or necessary to construct or relay any sewer or drain, it shall require from the City Surveyor or Engineer plans and specifications for an appropriate sewer or drain, with all necessary catch-basins, manholes and branches, and estimates of the work to be done and the probable cost thereof; and the City Surveyor or Engineer shall file such plans, specifications and estimates in the office of the City Recorder. If the Council shall find such plans, specifications and estimates to be satisfactory, it shall approve the same; or may amend and change the same as it may see fit. The Council shall thereupon declare by resolution its purpose to construct said sewer or drain, describing the same and the location thereof and including the estimate of the probable cost thereof. The action of the Council in declaring its intention to construct or relay a sewer or drain, directing the posting of notices thereof, and approving and adopting the plans, specifications and estimates of the City Surveyor or Engineer, may all be done in one and the same act.

“The resolution of the Council to construct or relay such sewer or drain shall be kept of record in the office of the Recorder, and shall be advertised by the Recorder for a period of ten days, by posting notices thereof in three conspicuous places in said city, or by publication thereof for a period of ten days in some weekly or semi-weekly or daily newspaper published in said city, which notice so published must be published at least three times.

“Within twenty days from the date of the first publication or posting of the notice required by the preceding section, the owner or owners of any property to be affected by said proposed sewer or drain, may file with the Recorder a written remonstrance

against the said proposed sewer or drain, and the Council upon hearing said remonstrance may, at its discretion, discontinue proceedings in said matter, or may overrule any and all remonstrances and objections, and shall have power and authority to order the construction of said sewer or drain or the repair or relaying of the same; and within three months from the date of the final publication of its previous resolution, may by Ordinance provide for the construction or relaying thereof, which shall substantially conform to the plans and specifications previously adopted.”

In addition to this, Section 115 of the charter provides that the proceedings in the matter of the assessment shall be the same as provided in Section 73, and following of the charter, which provides how the assessment shall be made, and that notice of such assessment shall be given for ten days before the ordinance assessing the same is finally passed.

There is no question that these latter requirements were conformed with in this case.

There is no provision in the Roseburg City Charter for the formation of regular sewer districts, and no provision requiring specific notice to the property owner of the property to be benefited in the early stages of the proceedings, or at any time prior to the proceedings for the assessment. The only notice up to that time provided for by the charter, is a general notice that the sewer is to be constructed.

If a notice, describing the property to be assessed, is required at this stage of the proceeding, it must be implied from the general terms of the charter, or derived from general principles of constitutional law.

We think that such a requirement cannot be implied from the charter.

It seems very plain that the charter does not contemplate the exact fixing of the property to be benefited by the improvement, until a much later time in the proceedings.

Section 73 of the charter provides:

“Whenever any construction * * of any sewer, any portion of the cost of which is to be assessed upon the property benefited thereby, *is completed*, * * the City Recorder, together with the committee on streets of the common council, shall *thereupon* apportion the cost thereof upon the lots, parts of lots and parcels of land benefited thereby.”

Up to that time the city council does not know, and has no way of knowing, what property is benefited by the improvement; and, of course, it would be impossible to give notice to the particular property owners that their property would be benefited thereby, and, therefore, that they would be assessed for the same.

1. If the city council was required to give notice to the particular property owners, in advance of the initiation of the proceedings, and it should turn out that some of the property—which was at first thought to be benefited—was not properly assessable; or if it should appear that other property, not at first thought to be benefited, should be included, the whole proceeding would fall to the ground, and have to be again initiated. Nor was any specific notice necessary for the protection of the land owner up to the time of the proposed assessment. Up to that time no lien had been fastened or attached to any particular property. Up to that time the city is simply proceeding to construct a sewer, and to provide for the cost of the same by assessment, against whatever property shall afterwards appear to be benefited thereby.

It is strongly urged on behalf of the respondents that they were entitled to be heard, and to have their "day in court" as it were, before their property was assessed and a lien fastened upon it.

No doubt this is true. But the property owner has his day in court, under the charter of the City of Roseburg, and his opportunity to be heard, when the proceeding for the actual assessment is reached. At that stage of the proceeding, the charter provides that a specific notice shall be served upon him, showing the property which is to be assessed for the improvement.

In this case such notice was actually given, and was effective, for the plaintiffs appeared and remonstrated, and after a hearing the remonstrance was overruled. It was after this hearing that the assessment against the property of plaintiffs was actually made.

The proceedings under similar charters, for the construction of sewers and the assessment of the cost upon the property benefited, has been frequently before the court.

In *Strowbridge v. City of Portland*, 8 Or. 67, it was contended by the plaintiff that—

"The city council should first declare by ordinance that the sewer is necessary, and describe its location, and define the district that is to be benefited and charged with the cost of its construction."

It was held that this was not necessary and Judge BOISE, delivering the opinion of the court, said:

"It is also urged by the appellant that the resolution did not fix the lateral bounds of the district to be charged with the cost of construction.

"From what has been said, it follows that the council had power to proceed and lay down the sewer, and then ascertain, by the method provided

in the proviso of Section 106, what property was directly benefited. So there is nothing in this objection. The proceedings of the council, as set out in the complaint, show that the same are a substantial compliance with the provisions of the charter providing for the construction of sewers. The view we take of Section 106 of the charter renders it unnecessary to notice any other points which were discussed in the argument."

The matter was again before the court in *Paulson v. City of Portland*, 16 Or. 450 (19 Pac. 450, 1 L. R. A. 673), in which the Strowbridge case was followed by a divided court. The Paulson case was appealed to the Supreme Court of the United States and was affirmed: 149 U. S. 30 (3 L. Ed. 637, 13 Sup. Ct. Rep. 750, see, also, Rose's U. S. Notes).

In that case the opinion was written by Mr. Justice BREWER and is very instructive, and we think entirely conclusive upon all the questions presented here. We quote from the opinion, italicizing portions deemed especially pertinent.

"By ordinance 5068 it ordered the construction of the sewer, and directed what area should be drained into that sewer, and created a taxing district out of that area. *For these, no notice or assent by the taxpayer was necessary.* A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So also the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion. * * By the same ordinance the city also provided that the cost of the sewer should be distributed upon the property within the sewer district, and appointed viewers to estimate the proportionate share which each piece of property should bear. *Here, for the first time in proceedings of this nature, where an attempt is made to cast upon his particular property a certain proportion of the bur-*

den of the cost, the taxpayer has a right to be heard.
* * It is settled that, if provision is made 'for notice to and hearing of each proprietor, *at some stage of the proceedings*, upon the question of 'what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.' "

Here, as we have seen, a notice, the sufficiency of which is not questioned, was given at the assessment stage of the proceedings. As was held by the Supreme Court of the United States in the Paulson case, that was the first time the property owner, as a matter of absolute constitutional right, could insist upon notice and opportunity to be heard.

2. It makes no difference, therefore, whether the map drawn by the city engineer, and showing the property to be benefited, was actually filed at the time it appears to have been filed or not, or as to whether it was kept on file in the recorder's office. Such a map was not necessary to the validity of the proceedings, however proper and fitting it may have been that such a one should be kept on file.

It is urged on behalf of respondent that the city charter provides that the original resolution, declaring the purpose of the council to construct a sewer, "shall describe the same *as to location thereof*," and it is claimed that this amounts to a requirement, that the property to be benefited, as well as the sewer itself, shall be located by the resolution.

But we think this construction cannot be maintained. It is the sewer itself, and not the property to be benefited thereby, that the charter requires to be located. This seems plain and obvious.

The sewer itself seems to have been fully located in this resolution:

“A 16-inch sewer on the south side of Lane Street to connect with the present 16-inch sewer on Lot 7, Block A, Flint’s Addition, with the end of the 16-inch sewer on Lot 11, Block A, Flint’s Addition.”

It is not claimed, as we understand it, that this description was not entirely sufficient to locate the sewer itself, and this, as we conclude, was all that was necessary in that regard in this particular resolution.

The plaintiffs, having had full notice and opportunity to be heard before the assessments were made on their property, and it not being necessary for the city council to fix the property benefited prior to that time, under this particular city charter, we think the proceedings of the city council must be upheld.

3. It is not necessary, in order to justify an assessment upon property, that it actually abuts upon the sewer, or be at the time connected therewith.

In *Beckett v. City of Portland*, 53 Or. 169 (99 Pac. 659), it is said:

“The general rule is that, where a municipality has authority to establish assessment districts and assess the cost of constructing sewers on property therein, it is not essential to the validity of an assessment that the property shall abut upon the streets or place where the sewer is laid. The question of benefits is one of fact, and, if it be determined by the proper tribunal that the property is specially benefited by the construction of the sewer, an assessment is proper to the extent of such benefit, whether the property is abutting or contiguous to the improvement or not.

4. Whether this property really was benefited by the improvement is a question of fact, upon which the finding of the city council is conclusive, except under special conditions not existing here.

This question, regarding street improvements, has very lately been fully considered by the court in banc in *Killingsworth v. City of Portland*, 93 Or. 525 (184 Pac. 248).

The judgment of the court below is reversed and the cause dismissed, with costs and disbursements of both courts to the defendant.

REVERSED AND DISMISSED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Denied June 8, 1920.

PETITION FOR REHEARING.

(189 Pac. 1119.)

On petition for rehearing. PETITION DENIED.

Mr. B. L. Eddy, for the petition.

Mr. Carl E. Wimberly and *Mr. Ira B. Riddle*,
contra.

BENNETT, J.—5. A petition for rehearing has been presented in this case, and in the accompanying brief it is strenuously urged, that the decision in effect, repeals Section 111 of the city charter of the City of Roseburg, or reads out some provision of that section.

The particular provision of the section, which is thought to have been read out or repealed, is not set forth in the brief for rehearing, but we infer from the general line of argument that it is claimed the section contains some provision, requiring the council to create a sewer district, or to set out, at the time of the original resolution, the property which

will be benefited by the proposed sewer, and that notice of such property be given in advance of the construction of the sewer. There is no such provision in this section, nor, as far as we have been advised by counsel, anywhere in the charter. We quote Section 111 again in full, taking it from the brief of respondents:

“Whenever the Council shall deem it expedient or necessary to construct or relay any sewer or drain, it shall require from the City Surveyor or Engineer plans and specifications for an appropriate sewer, or drain, with all necessary catch-basins, manholes, and branches, and estimates of the work to be done and the probable cost thereof; and the City Engineer or Surveyor shall file such plans, specifications, and estimates in the office of the City Recorder. If the Council shall find such plans, specifications, and estimates to be satisfactory, it shall approve the same; or may amend and change the same as it may see fit. The Council shall thereupon declare by resolution its purpose to construct said sewer or drain, describing the same and the location thereof and including the estimate of the probable cost thereof. The action of the Council in declaring its intention to construct or relay a sewer, or drain, directing the posting of notices thereof, and approving and adopting the plans, specifications and estimates of the City Surveyor or Engineer may all be done in one and the same act.”

There is not a word in the section which requires the council to create and define any sewer district, or to specify the property which will be benefited, or that any notice of a sewer district, or of the property benefited, shall be given at this stage of the proceeding. The plans and specifications which are to be required from the city surveyor, are plans and specifications *of the sewer itself*, and not plans of any sewer district, or of any property to be ben-

efited, and it is the location of the sewer itself, and not the location of any sewer district, which is required to be given in the resolution, provided for in the latter part of the section.

“Shall declare its purpose to construct said *sewer* or drain, describing the *same* and the location thereof.”

The sewer itself is one thing, and the sewer district (if there is one) or property benefited is quite another. The charter requires the resolution to give the location of the sewer, but does not require it to create a sewer district at this time, or to designate or locate the property benefited. This is as plain as the English language can make anything. We are not reading anything out of this section. On the contrary, we are taking it word for word exactly as it reads; and we have no more right to read anything *in* to the charter, than we would have have to read something out.

As we read the record, the city council did comply with every word of this section. It did require plans of the sewer itself, and did give its location, and did publish a notice of these things, as the charter required. This notice was not, and was not required to be, addressed to any particular person, nor was it required to describe any particular property or assessment district. It was in the nature of a notice to all whom it might concern. It was a notice to every taxpayer in the city, and to every person whose property lay in such a shape that it might be benefited, that the city was proposing to construct the sewer, and that all the conditions and assessments authorized by the charter, might follow.

Afterwards, and before the property to be assessed was directly affected in any way, or any lien

fastened upon it, the council was required to specify the property to be assessed, and to give the owners notice and opportunity to be heard. This gave such owners their "day in court" and opportunity to be heard, and fully satisfied all their constitutional rights. It seems to be conceded that this also was done. There is no provision of the charter, and no constitutional provision, requiring anything more.

The petition for rehearing is denied.

REVERSED. SUIT DISMISSED. REHEARING DENIED.

McBRIDE, C. J., BEAN and JOHNS, JJ., concur.

Argued at Pendleton, May 3, affirmed June 8, 1920.

In Re McILROY.

McILROY v. McILROY.

(190 Pac. 309.)

Insane Persons—Guardian of Incompetent—Petition Need Only Follow Statute.

1. Petition for appointment of guardian for an alleged incompetent is sufficient if it follows substantially the wording of Section 1319, L. O. L., and it is not necessary to allege all facts and details tending to show the individual is incapable of conducting his own affairs.

Insane Persons—Evidence—Guardian and Ward—Incompetency.

2. On a son's petition, under Section 1319, L. O. L., for appointment of guardian for his ninety-one year old father, evidence held to show that the father was incapable of conducting his own affairs, and to call for guardianship to manage and preserve the estate.

[Presumption as to continuance of permanent insanity, see notes in 4 Ann. Cas. 491; Ann Cas. 1912C, 388.]

From Union: JOHN W. KNOWLES, Judge.

In Banc.

This proceeding was initiated in the County Court of Union County, to have a guardian appointed for the defendant, James McIlroy, father of the petitioner. The petition alleges that James McIlroy has in his own right about \$15,000 in Liberty bonds, notes, certificates of deposit, cash and other property to the value of about \$2,000; that he lives alone and is unable to look after his own business; that on the —— day of May, 1919, he drew his money and securities from the First National Bank of Elgin and put them away somewhere about his house, forgot where he hid them and reported the loss to many people around the town; that it is unsafe for him to have any money around the house, as it subjects him not only to loss but to danger of violence and robbery; that he is almost blind and his mind and memory are greatly weakened by age; that he is incapable of conducting his own affairs and maintaining himself; that he refuses to live with or make his home with any of his relatives; and that unless a guardian is appointed to care for him his property will be lost and dissipated.

A restraining order was granted and a citation issued to James McIlroy. The defendant appeared by his attorney and filed motions to strike out the petition upon the ground that it did not state facts sufficient to show that he was wasting his estate or was incompetent to manage his business, and to dissolve the restraining order, both of which were overruled. The defendant filed an answer denying the material allegations of the petition and alleging that the proceeding was prompted by malice and an attempt on the part of the petitioner to prevent him from conducting his own affairs and to embarrass

him in the disposition of his property; that he had acquired all his property by his own industry and ability; that he has always conducted his own business and is still able to do so; that he has relied upon his son William McIlroy and the latter's wife to attend to his affairs as he directs; and that he is able and competent to manage his property and business and does not waste anything. He prayed that the proceeding be dismissed and the restraining order dissolved. The reply denied all the new matter in the answer.

A trial was had, testimony was taken and the court found that the defendant is about ninety-one years of age; that his eyesight is defective and his hearing greatly impaired; that he is suffering a deterioration of intellect, and senile dementia; that he is unable to conduct his own affairs and that he requires the services of a guardian for his person and estate. The court appointed F. L. Meyers as his guardian upon the giving of an approved bond for \$15,000 by Meyers.

An appeal from that decision was taken to the Circuit Court. The case was there tried *de novo* upon the record and transcript made in the County Court, and the Circuit Court made findings of fact and rendered a decree affirming the decision of the County Court and its appointment of F. L. Meyers as guardian. The defendant appeals, claiming that the Circuit Court erred in not discharging the defendant from the custody of a guardian, in not releasing his property, in decreeing that he is incapable, or by reason of his age not competent to manage or control his business affairs, and in confirming the appointment of a guardian to look after his person and estate.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Charles H. Finn*.

For respondent there was a brief and an oral argument by *Mr. John S. Hodgins*.

JOHNS, J.—1. The petition is based on Section 1319, L. O. L., which provides that the several County Courts shall have power to appoint guardians to take care of the estates, real and personal, of all who are unable to manage their own property and business. In this kind of a pleading it is sufficient if the petition follows substantially the wording of the statute. It is not necessary to allege all of the facts and details tending to show that an individual is “incapable of conducting his own affairs”: *Dickenson v. Henderson*, 90 Or. 408 (176 Pac. 797). In the case of *In re Northcutt*, 81 Or. 646 (148 Pac. 1133, 160 Pac. 801), it was held that if Northcutt were “unable without assistance properly to manage and take care of his property and would be likely to be deceived, dominated or imposed upon by artful or designing persons,” he would be incapable of conducting his own affairs, within the meaning of Section 1319, L. O. L.

The testimony shows that the defendant is between ninety-one and ninety-three years of age; that he earned and accumulated funds and property after he was seventy years old; that he was divorced from his wife about twenty years ago; that he was the father of a large family, and all but one of the children took the part of the mother; that he lived alone in his own building at Elgin; that he did his own cooking and looked after his own wants; and that physically he was quite active for a man of his age.

It also appears that until recently both his hearing and eyesight were good; that he read the newspapers and in large measure attended to his own business; that when the petition was signed his hearing was defective and his sight was very poor; that he had difficulty in recognizing his friends except by their voices, and that they had to speak in fairly loud tones in order for him to hear at all.

In recent years he had his money, bonds and securities on deposit in an Elgin bank, and its officers looked after his business. His memory became very defective and he had somewhat of a delusion about his children, imagining that they had robbed him in a business transaction long past. He had acquired the habit of taking his assets from the bank, hiding them somewhere in the house where he lived and later returning them to the bank. He did this several times in the four or five months next preceding the filing of the petition. Among his assets he had \$5,000 in Liberty bonds that were "payable to bearer" and the title would be passed by delivery, and \$5,400 in certificates of deposit in the Elgin bank, payable to his order. The testimony is undisputed that he took all of these papers from the bank, placed them in his kitchen stove, where they would be destroyed by a brisk fire, later concealed them elsewhere and forgot where he put them. He then notified some of his neighbors that he had been robbed. Six or seven of them joined in a diligent search of his premises, including the stove and an old mattress where he claimed he had put his papers. He also told them that at times he placed his valuables in the ash-box of his heating stove. After a thorough investigation lasting about an hour and a half nothing was found, and for want of a light the

searchers quit until the next morning. The bonds and deposit slips were later discovered in an old trunk, where the defendant had evidently placed them.

Several witnesses were called to testify concerning the defendant's actions, conduct and capacity to transact business and care for his property; and there was some evidence on his part, especially that of his son William, tending to show that he was competent and qualified to look after his business affairs. He was present at the hearing in the County Court, but was not called as a witness. The testimony was taken before the county judge, who had more or less personal knowledge of the surrounding circumstances. His findings were later approved by the Circuit Court.

2. The strenuous objection of the son William to the appointment of a guardian was upon the ground that the father would not receive proper care and attention and that the guardian would appropriate the estate and dissipate it in costs and expenses. The purpose of the statute is to provide for the appointment of a custodian for anyone who is "incapable of conducting his own affairs." After a careful reading of the testimony we are satisfied that it is prudent and best for his own interests that a guardian be appointed for the defendant to manage and preserve his estate. The man named is the cashier of a bank at La Grande and is under a sufficient bond. His conduct and management are subject to the approval of the County Court, and it must be assumed that he will render a correct accounting of his trust. It is apparent that the defendant cannot manage his property without assistance, and there is serious danger that without a guardian he might

be "dominated or imposed upon by artful or designing persons."

The decree is affirmed.

AFFIRMED.

Argued April 21, affirmed June 8, 1920.

THE W. T. RAWLEIGH CO. v. MCCOY.*

(190 Pac. 311.)

Guaranty—Contract—"Purchase"—"Transfer."

1. Where a company contracted to sell goods on credit at wholesale to a buyer reselling the same in certain territory, and the buyer with the company's approval accepted from another buyer from it under a similar contract goods in his possession not paid for, and authorized the company to charge him with the amount of the invoice price thereof, he obtained title thereto, by transfer from the other buyer, who had absolute title, and not by purchase from the company, within the terms of a guaranty of payment for goods purchased under the contract; a "transfer" being an act or transaction by which property of one person is by him vested in another.

Guaranty—Liability—Compensation—Construction.

2. Liability of guarantors without hire or compensation is strictly construed.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

The plaintiff is an Illinois corporation, with its principal office and place of business at Freeport, in that state, and a branch office at Oakland, California. It is engaged in a line of supplies commonly placed and used in the country home. Its method of business is for someone to make an application to the home office to purchase its goods, wares, and merchandise, to be sold by him within a certain territory. If found suitable, it then forwards one of

*For authorities passing on the question of definition and elements of a sale, see note in 26 L. R. A. (N. S.) 5. REPORTER.

its standard written contracts, attached to which and made a part thereof is a guaranty, to be executed by two or more different persons, to the effect that they are liable for and will pay for all goods that may be purchased from the plaintiff by their principal under the contract.

In the instant case M. C. Seward entered into such contract with the plaintiff, the material provisions of which are that it agreed to deliver the merchandise sold to Seward f. o. b. at Freeport, Illinois, or one of its branches at its option.

“Said seller agrees to sell said buyer all such goods, wares and merchandise at its current wholesale prices at the date of shipment; such prices to be shown by itemized invoice for each purchase, and shipment to be made on orders from said buyer.”

In consideration thereof Seward agreed to pay the plaintiff its wholesale price f. o. b. for all merchandise which he purchased, and it agreed to purchase from him during the term, or after the expiration of the contract, at current wholesale prices, such merchandise as he “may then have on hand and unsold,” provided it is in suitable condition, and “pay or credit the buyer therefor on the return of such products.” He agreed to pay the plaintiff “its actual expenses of receiving, inspecting, and overhauling all such goods, wares, and merchandise.” The contract further provided that it is subject to acceptance at the office of said seller at Freeport, Illinois, and “shall be in force and effect from and after the date of its acceptance,” and that it might be terminated upon the written notice of either party, and that it would expire by its own limitation on December 21, 1918; also “that this contract includes and does and shall constitute the sole and

only and entire agreement between the parties hereto," and that it "shall not be changed or modified in any particular whatsoever by any employee or representative of the seller in any capacity, unless any such change or modification shall first be specifically reduced to writing and signed by both of the parties hereto, and then any such change or modification shall only be effective after the corporate seal of the seller shall have been duly affixed thereto."

In consideration of extending a line of credit to Seward, the defendants did "jointly and severally guarantee, unconditionally, the full and complete payment to said company of any and all indebtedness which may become due under the terms of the above and foregoing contract by the buyer named as such therein," and agreed that the guarantee could be enforced against them without joining Seward as a party to the action. There are a number of immaterial provisions. The contract with the guarantee attached was duly accepted in writing by the plaintiff at its home office on August 9, 1917.

The plaintiff alleges that between August 16, 1917, and January 8, 1918, and relying upon said guarantee and the credit of the defendants, it sold and delivered to Seward merchandise of the reasonable value of \$563.69, upon which there had been paid \$321.88, leaving a balance of \$241.81 due and owing, for which it prays judgment against the defendants, with interest.

The defendants admit the making of the contract by Seward, and the execution of the guarantee as alleged, deny all other material allegations, and as an affirmative defense in the nature of a plea in abatement allege that the plaintiff has failed to comply with the laws of Oregon relating to the doing of

business with foreign corporations or the appointment of an agent, and that it was engaged in doing business in the State of Oregon at the time of the alleged making of the contract. As a second defense they plead that the alleged contract set out in the complaint was not executed or accepted by the plaintiff until the seventeenth day of August, 1917; that Seward had paid the plaintiff for all the goods which he had purchased after that date, and that such payments should be applied on the sale of goods which he purchased after the guarantee was accepted. It is then alleged that about December 1, 1917, plaintiff terminated its contract with Seward, took away from him all of the goods in his possession, and transferred them to Max Luebke, of Cottage Grove, Oregon, substituting him as a debtor for Seward; that the plaintiff now seeks to hold the defendants liable for the goods which were transferred by the plaintiff to Luebke without the consent of the defendants, and by reason thereof the alleged guarantee became and is null and void; and that defendants were released from liability. The defendants plead a third defense which is not important here.

For reply the plaintiff alleged that the goods referred to in the complaint were sold to Seward and the contract therefor was made in the State of Illinois, and it is not liable for a license fee to the State of Oregon, and that Seward was given credit on his contract to the plaintiff for all the goods which were turned over to Luebke, and for the amount thereof defendants were released upon their guaranty.

It appears that J. S. Barnett had a like contract with the plaintiff in the same territory, which it

terminated on August 4, 1917, and that he then had in his possession in Lane County, Oregon, goods, wares and merchandise which he had purchased from the plaintiff, and which were of the reasonable value of \$320.94. Barnett then delivered this merchandise to Seward, who took actual possession of it as of that date, and thereafter proceeded to sell it as his own.

When the plaintiff had introduced its evidence the court stated "that by eliminating the Barnett claim of \$320.94 the defendants are entitled to a directed verdict. Therefore that will be the order of the court, a directed verdict for the defendants." Plaintiff duly excepted to this ruling. The jury returned such a verdict, upon which judgment was entered and from which the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Fred. E. Smith* and *L. M. Cravis*, with an oral argument by *Mr. Smith*.

For respondents there was a brief and an oral argument by *Mr. C. A. Hardy*.

JOHNS, J.—1. The vital question in this case is: To whom did Barnett sell his stock on August 4, 1917, which was then in Lane County, Oregon, from whom did Seward purchase it, and when and where was the deal consummated? Assuming that the defendants are not liable for the goods which Seward received from Barnett, it is apparent that Seward has paid the plaintiff in full for all the merchandise which he purchased from the plaintiff, and that it would not have any legal claim against the defendants.

When the contract between them is analyzed, it simply means that the plaintiff agrees to sell and Seward agrees to buy such reasonable quantities of goods, wares and merchandise as he "may from time to time desire to purchase" at current wholesale prices at the date of shipment, to be evidenced by an itemized invoice, which purchase and shipment is to be made on orders from Seward, and in consideration thereof he agrees to pay the plaintiff such prices for the goods which may from time to time be sold to him. In other words, on the stipulated terms, Seward agreed to pay for all the goods which he actually purchased from the plaintiff. The defendants guaranteed the full and complete payment to plaintiff of any indebtedness of Seward which might become due or owing for the goods which he purchased under the contract.

On August 4, 1917, Barnett signed the following statement addressed to the plaintiff:

"Subject to your approval, I have this date transferred to Mr. E. M. Seward, address Divide, Ore."

Then follows the list of products, supplies, etc., transferred, amounting to \$320.94. At the same time Seward signed the following written statement, also addressed to plaintiff:

"Subject to your approval, I have this date accepted from Mr. J. S. Barnett, Address, Creswell, Ore., all of the products listed above, and certify that this is a true and absolutely correct list of all products transferred. I hereby instruct and authorize you to charge these products to my account at regular current wholesale prices to buyers. I have retained a list of the products received as shown above, and ask you to mail me a fully itemized invoice promptly."

These writings were executed at Creswell, in Lane County, Oregon, in the presence of F. G. Larson, of Oakland, California, who was apparently acting for and representing the plaintiff. At Freeport, Illinois, on August 16, 1917, the plaintiff mailed to E. M. Seward, Divide, Oregon, the following communication:

“Following is a list of products you report receiving from Mr. J. S. Barnett, Creswell, Ore. Complying with your instructions, we have charged these products to your account at current wholesale prices as follows: [Then follows a list of the prices].”

Under the same conditions another like notice was mailed on August 29, 1917, and notice in return was mailed to Seward on September 27, 1917. This price list amounted to \$35.75.

Exclusive of such writings there is no competent testimony as to when, where, how, and by whom Seward acquired title to the goods which he received from Barnett; but it appears from them that subject to the approval of the plaintiff, on August 4, 1917, Barnett transferred the listed merchandise to Seward, and that, concurrent therewith and subject to the approval of the plaintiff, Seward accepted the transfer and authorized the plaintiff to charge him with the amount of the invoice price.

“A transfer is an act or transaction by which property of one person is by him vested in another. This, without the use of some qualifying word, is the legal meaning of the term. Transfer is an act of the parties or of the law, by which the title to property is conveyed from one living person to another”: 8 Words & Phrases, 7064.

“The Supreme Court, in the case of *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438 (45 L. Ed. 1171, 21 Sup. Ct. Rep. 906, see, also, Rose’s U. S. Notes),

said 'transfer' is defined to be not only the sale of property, but every other and different mode of disposing of and parting with property. All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means or manner by which property can pass from the ownership and possession of another": 8 Words & Phrases, 7066.

The plaintiff contends that it purchased those listed goods from Barnett on August 4, 1917, and sold them to Seward on August 16, 1917, after it had accepted defendants' guarantee on August 9, 1917. The burden of proof was upon the plaintiff, and the only competent evidence of the sale was the writings. As we analyze them, Seward obtained title to those goods through the transfer from Barnett, of which the company was duly notified; in consideration thereof Barnett was credited on his account with the plaintiff for the amount of the invoice price; and concurrent therewith Seward assumed, and the plaintiff charged him with the amount for which it had given Barnett credit. In other words, Seward assumed the payment of Barnett's debt for the amount of the listed price. Under a like contract Barnett had previously purchased from the plaintiff and agreed to pay for the merchandise which he transferred to Seward on August 4, 1917, and it was charged to him on plaintiff's books. It was his property, and he had a right to transfer it to Seward or anyone else, with or without the approval of the plaintiff. While it is true that the actual amount which Seward was to pay for it was evidenced by the value placed upon the listed goods by the plaintiff, the purpose of that was to determine the amount of Barnett's debt to the plaintiff, which Seward had assumed and agreed to pay,

and for how much the plaintiff should give credit, and the amount which it should charge to Seward.

2. The defendants became guarantors to Seward without hire, or any compensation moving to them, and for such reason their liability must be strictly construed.

“A guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance he has guaranteed”: *Staver & Walker v. Locke*, 22 Or. 519 (30 Pac. 497, 29 Am. St. Rep. 621, 17 L. R. A. 652).

Under their guaranty the liability of the defendants was limited to the payment for goods which Seward purchased from the plaintiff on or after August 9, 1917, and they are not liable for the merchandise which was transferred by Barnett to Seward on August 4, 1917, or any debt of Barnett to the plaintiff which Seward assumed and agreed to pay.

Judgment is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENNETT, J., concur.

BEAN, J., Dissenting.—This case turns upon the question of whether or not E. M. Seward, who had a contract with the plaintiff, the W. T. Rawleigh Company, which the defendants guaranteed in writing, purchased the first lot of goods received by him, which are involved in the action, from plaintiff or from J. S. Barnett. It appears that Barnett dealt with and sold the goods of plaintiff under a contract like the one between plaintiff and Seward. This contract provided, among other things, as follows:

“The seller agrees to purchase from said buyer at any time during the term of or promptly after the termination or expiration of this contract, and at the wholesale prices then current, all goods, wares

and merchandise (wagon excepted) as the buyer may then have on hand and unsold: Provided, that these products are in as good and salable condition when received by the seller as when purchased by him from the seller, and pay or credit the buyer therefor on the return of such products promptly by prepaid freight to Freeport, Illinois, or at such other branch, transfer house, or other regular place of shipment as may be designated by the seller in writing; and provided, further, that said buyer shall pay to the seller its actual expense of receiving, inspecting, and overhauling all such goods, wares and merchandise."

By deposition J. R. Jackson, the secretary of the plaintiff company, testified as to the purchase of the goods thus:

"26—You may state whether or not E. M. Seward, after the making of the contract, Exhibit 'A,' purchased any goods from the plaintiff, under said contract, and, if so, how were such purchases made." To which the witness made the following answer: "Yes, after his contract was accepted, Mr. Seward purchased goods from us under this contract. The first goods he purchased from us were goods which we had repurchased from a man who was in business in that community, and under the contract we had with him we repurchased his goods here at Freeport, and then sold them to Mr. Seward under a bill of sale that we had; the deal all being consummated here at Freeport. Then we sold him some other goods on his written order, which were sold him f. o. b. cars, Oakland, California."

An invoice of the goods which are the subject of dispute was made out by J. S. Barnett, E. M. Seward, and F. G. Larson, the representative of the plaintiff, of Oakland, California, on a transfer order blank of plaintiff's, which states the following:

“Transferred from J. S. Barnett, retailer transferring products, to E. M. Seward, retailer receiving products:

“August 4, 1917.

“The W. T. Rawleigh Company.

“Gentlemen: Subject to your approval, I have this date transferred to Mr. E. M. Seward, address Divide, Ore., * * my stock of Rawleigh Products, * * which are to be credited to my account at current wholesale prices as per contract.”

After some other particulars follows the signature of J. S. Barnett and then a list of the goods at the bottom of which it is stated that, subject to the approval of the company, E. M. Seward accepted from Barnett the products listed. Mr. Seward testified in regard to the supplies contained in the list as follows:

“Q. Did you receive from the plaintiff the goods referred to in Exhibit ‘B’?

“A. Yes, I received them from Barnett, through their agent, it was their assistant, the manager from Oakland was there at the time.”

He further stated:

“He [Barnett] had the goods in his possession, and they were transferred, just as I transferred all the goods I had left to Mr. Luebke.”

He testified in effect that he got the list of the goods and the possession of the goods from Barnett; that he did not pay Barnett for them, but only paid him the money that he had paid out for freight; that he did not promise or agree to pay Barnett the purchase price of the goods; that no value of the supplies was fixed between Seward and Barnett at the time of the transfer; that the price was fixed by the company; and that he was sent a list of the goods, with the price attached and was charged with

the amount, and Barnett was credited with it, \$320.94. This appears to have been done at Freeport, Illinois, on August 16, 1917, when the transfer was completed.

I find no semblance of testimony showing that Barnett sold any of these goods to Seward, or pretended to make such sale. The written evidence shows, directly to the contrary, that the goods were repurchased by the plaintiff from Barnett and sold to Seward, the payment for which was guaranteed in writing by the defendants. It was a three-cornered transaction, but was in writing, and was plain and fair. Seward appears to have made no contract whatever with Barnett in regard to the goods:

We find in 23 R. C. L. 1186, Section 2:

“Blackstone defines a sale to be ‘a transmutation of property from one man to another in consideration of some price or recompense in value,’ and the term has been defined by courts as a transfer of the property in a chattel for a consideration. To constitute a sale in its broader sense the price need not necessarily be money, but if the property is sold for a fixed money price, whether it be paid in cash or in goods, it is a sale. In its more strict sense a sale may be defined as ‘transfer of the absolute or general property in a thing for a price in money,’ which the buyer pays or promises to pay for the thing bought and sold, and it has been said that it means at all times a contract to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold.”

To the same effect see 35 Cyc. 25.

The trial court erred in directing a verdict for the defendants in the face of practically uncontradicted testimony. I am therefore unable to concur in the opinion of Mr. Justice JOHNS.

Argued April 27, affirmed June 8, 1920.

McDONALD v. SUPPLE.

(190 Or. 315.)

Pleading—Amendment—Discretion of Court—Implied Contract.

1. Where the original complaint relied on a supplemental oral agreement modifying a written contract for services in erecting steel dredge-hulls, etc., it was not an abuse of the trial court's discretion to allow plaintiff to file an amended complaint, relying on an implied contract to pay a greater sum; the two causes of action not being inconsistent.

Work and Labor—Contract—Additional Compensation—Implied Agreement.

2. Where defendant agreed to pay a fixed sum per ton for constructing steel dredge-hulls out of fabricated steel, and defendant failed to promptly supply the steel, and that supplied did not have numbers, etc., plaintiff, having at defendant's request continued to perform the contract, is entitled to recover additional compensation on the implied contract.

Contracts—Evidence—Surrounding Circumstances.

3. Under Section 717, L. O. L., for the proper construction of a written contract, the circumstances under which it was made, including the situation of the subject matter and parties, may be shown.

Evidence—Technical Meaning of Contract Notwithstanding Presumption.

4. Under Section 718, L. O. L., evidence is admissible to show that the terms of a written contract have a technical, local, or peculiar significance, notwithstanding the presumption that words are used in their primary and general acceptance.

Evidence—Contract—Parol Evidence to Supply Omitted Term.

5. Under Section 713, L. O. L., it is competent to introduce testimony to supply those terms actually agreed upon by the parties to a written contract, but not contained in nor conflicting with an incomplete written contract.

Evidence—Contract—"F. O. B. Cars"—Fabricated.

6. In an action on contract for the erection of barges out of fabricated steel, evidence that the steel was not painted, so that the numbers wore off before receipt, was admissible, as well as evidence as to the meaning of the terms "f. o. b. cars," "fabricated," etc.

Evidence—Contract—Time—Delivery of Steel.

7. In an action for additional compensation on a contract for the construction of steel barges out of fabricated steel, evidence as to the time of delivery of the steel was admissible, though not specified in the contract.

Work and Labor—Quantum Meruit—Right to Recover for Extra Work.

8. Where failure to perform his part of the contract, by defendant, who had engaged a contractor for a fixed price per ton to construct steel dredges out of fabricated material, made the labor more burdensome and expensive, the contractor, having continued the contract at defendant's request, could recover on *quantum meruit*.

Contracts—Partial Payments—Additional Compensation.

9. Where a contract for the construction of steel barges out of fabricated materials provided for partial payments, the fact that the contractor accepted partial payments at the contract rate, notwithstanding defendant's failure to carry out his agreement greatly increased the labor cost, etc., did not preclude recovery of additional compensation, where defendant frequently assured the contractor that when the work was done he would make the same right.

Appeal and Error—Conflicting Evidence—Verdict not Reviewed.

10. A verdict on conflicting evidence will not be reviewed.

Work and Labor—Contract—Deviations—Additional Compensation.

11. Where defendant's deviations from the contract were most serious, and caused the contractor additional expenditures for labor cost, etc., the fact that the deviations were not numerous will not prevent recovery of additional compensation.

[As to right of contractor to recover for extra work ordered by architect, but not ordered in express manner provided by working contract, see notes in 7 Ann. Cas. 213; 17 Ann. Cas. 81.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2.

This is an action at law, begun by Robert Wakefield April 17, 1914, in which he set up a cause of action based on a written contract entered into between plaintiff and defendant, and upon an express oral modification of the written contract. The agreement in question required plaintiff to erect and assemble the U. S. Engineers' dredge-hulls, "Multnomah" and "Wakiakum," defendant to furnish the materials and to pay plaintiff \$15 per ton for every ton of hull material erected and put together, and \$7.50 per ton for the assembling of the trusses and

ladders. Issues being raised, the case proceeded to trial upon the theory that plaintiff was suing for his labor performed and materials furnished under the written contract and the express oral modification thereof as to compensation.

A verdict having been rendered in favor of plaintiff, a motion of defendant for a new trial was granted by the trial court upon the ground that there was no evidence of the alleged subsequent oral modification of the written contract. Upon appeal to this court the judgment of the lower court was affirmed and the cause was remanded. See *Wakefield v. Supple*, 82 Or. 595 (160 Pac. 376). By leave of the trial court, plaintiff thereupon filed an amended complaint. The defendant moved to strike paragraph VII therefrom upon the ground that it set up a cause of action inconsistent with and contradictory to the cause of action set forth in the original complaint, and introduced a new cause of action. The motion was denied. Paragraph VII of the amended complaint reads thus:

“That if the materials had arrived fabricated and ready to erect and in proper condition, and in the condition contemplated and agreed upon as hereinbefore set out, the entire work of construction of said two hulls which the plaintiff was to perform, could have been completed within sixty (60) days, and it was contemplated and agreed between the parties that the materials would arrive in sufficient quantities to allow the constant and efficient progress of the work within a few days after the 11th day of February, 1913, so that if the materials had arrived within the time contemplated and agreed upon, and in the condition contemplated and agreed upon, all the work which plaintiff was to do could have been finished by the 20th day of April, 1913, and that at the time of entering into said agreement dated February 11, 1913, it was well known to both

parties thereto that plaintiff was entering into the same, because plaintiff had available large numbers of competent workmen, who would be available for the period of time required to finish the work with the materials furnished in the condition and in the time contemplated, and that by using said men in said period that plaintiff and defendant both knew plaintiff would be able to do said work much more cheaply than if plaintiff was to be required to do the same at a later period during the summer and fall months, because, as plaintiff and defendant both knew, labor conditions in and about the City of Portland during the summer and fall months would be and were substantially different, in that during the summer and fall months plaintiff would be required to and did pay about twice what workmen could have been hired for if the work had been done in the time and was of the kind contemplated and agreed upon when the agreement of February 11, 1913, was entered into; that, if the materials had arrived at the time and in the condition contemplated and agreed upon, plaintiff could have performed said work at about the cost of \$15.00 per ton for the hull material, and about \$7.50 per ton for the trusses and ladders, but because the material did not arrive until about the 15th day of June, 1913, and because the defendant was constantly advising plaintiff that the material would arrive within a day or two, plaintiff was required to and did keep large quantities of equipment on hand ready for use and was required to and did keep large numbers of men on hand, all of which largely added to the expense and burden of doing said work and thereby greatly damaged plaintiff; that when the materials actually arrived their defective condition prevented the men from expeditiously handling the work and interfered with the progress of the workmen to the extent that only about one-third of the amount of work was performed by the workmen of what would have been performed with proper materials, and only about one-third efficiency could be obtained in the use of the plaintiff's equipment, and when the materials

arrived their condition of themselves caused the men to many times a day stand idle at different parts of the work until the defective condition of the material could be remedied; that the ways furnished by the defendant for the construction of said two hulls were upon a steep slope, and because the materials did not arrive so that the lower hull could be promptly completed the high spring waters of the Willamette River came upon and over said hull during the course of construction after considerable work had been done thereon, and filled all the joints with sand and debris, thereby causing and requiring the cleaning of said joints, the partial dismantling of the work, and great trouble, annoyance and confusion, and as a result purely of the defaults and breaches on the part of the defendant the plaintiff was required to and did perform labor and services and furnish materials in the construction of said two hulls, which were totally unlike and had no relation to the kind of work, labor and materials it was contemplated and agreed plaintiff was to furnish under said agreement of February 11, 1913; that the reasonable cost and value of the work as actually performed, on account of the defaults and breaches of the defendant, was actually \$29,408.98, whereas, if the materials had arrived within the time and in the condition contemplated and agreed upon, the reasonable cost and value of the said materials would have been approximately \$9,000.00, and that said increases of costs and the damage to plaintiff cannot be measured by attempting to apportion same to the detailed parts of the performance of the work and construction of the said two hulls, for the reason that the work as actually performed cannot be traced to or applied upon the work contemplated, and the condition of the performance of the same is substantially different, and by reason thereof the plaintiff does not claim damages for each several breach within itself, as it is impossible to separate the same and apply it against the total result, because of the difference in the work contracted for

and performed, but plaintiff alleges that all of plaintiff's work, even with all of the defaults and breaches on the part of defendant, was performed by the 13th day of November, 1913, and was thereupon accepted by the defendant, the defendant now retains the same and the benefit thereof; that the reasonable worth and value of the work, labor and materials so furnished by plaintiff to defendant upon said two hulls, is the sum of \$29,408.98, of which defendant has paid only \$8,755, leaving a balance due plaintiff in the sum of \$20,623.98, which balance and any part thereof defendant refuses to pay, and said defendant refuses to recognize that this plaintiff has any rights in the premises, other than the rights fixed in the written agreement hereinbefore referred to, and said defendant refuses to consider, with plaintiff, plaintiff's rights in the premises, and defendant renounces and denies plaintiff's rights in the premises."

Defendant filed an answer, which after admitting a portion and denying a portion of the allegations of the complaint, set up three separate defenses, which may be summarized as follows: First, that Wakefield was himself responsible for the excessive and burdensome services performed by him, by his negligence in failing to provide proper tools or skillful employees, and Wakefield had agreed to adjust his differences with the Great Lakes Engineering Works and had so adjusted them; that time was of the essence of the Supple-Wakefield contract, and by Wakefield's negligence in the premises Supple had been subjected to payment of various penalties; second, that the plaintiff, by having prosecuted his original complaint, was barred from prosecuting the amended one; third, that all the work done by plaintiff was done under the original contract of February 11, 1913. Plaintiff filed a reply denying generally all the allegations in defendant's answer,

which conflicted with the averments of the complaint. The trial resulted in a verdict and judgment in favor of plaintiff for \$10,000. Defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Langguth & Lyons* and *Mr. L. E. Crouch*, with oral arguments by *Mr. H. L. Lyons* and *Mr. Crouch*.

For respondent there was a brief and an oral argument by *Mr. Coy Burnett*.

BEAN, J.—Error is predicated, first, upon the amendment of the complaint; second, in refusing to grant the motion to strike out paragraph VII of the amended complaint; also in denying defendant's motion for a nonsuit. These assignments of error raise practically the same question. It will be noticed that in the original complaint plaintiff alleged that it was agreed in writing that he should perform certain services for defendant for a certain fixed compensation, and that by a subsequent and supplemental oral agreement between plaintiff and defendant the defendant agreed to pay plaintiff for his services what the same were reasonably worth.

1. The amended complaint which was filed before the trial, sets forth the facts constituting an implied agreement to pay, in addition to the written contract prices, such a sum as would reasonably compensate plaintiff for the services performed by him under the changed conditions and circumstances set forth in the amended complaint, which work was accepted with a full knowledge of all conditions by defendant Supple. We do not think there is such a difference or inconsistency between an express agreement and

a promise implied by law as to preclude an amendment or change from one to the other, to be made before trial. In the case of *Elder v. Rourke*, 27 Or. 363 (41 Pac. 6), the two allegations were included in the same complaint, and it was approved by this court. In that case plaintiff alleged that he

“performed work and labor for defendant, at his special instance and request, in cutting, heading, and harvesting the wheat then growing on nine hundred and sixty-five acres of land, at the agreed and stipulated price of one dollar and twenty-five cents per acre, amounting in the aggregate to the sum of one thousand two hundred and six dollars and twenty-five cents; that said work and labor was and is reasonably worth the sum of one dollar and twenty-five cents per acre, and of the reasonable aggregate value above stated.”

Error was there assigned in permitting plaintiff to testify that the work performed by him was reasonably worth \$1.25 per acre. It was held that the evidence was within the issues made by the pleadings. In *Zimmerle v. Childers*, 67 Or. 465, at p. 471 (136 Pac. 349, at p. 351), Mr. Justice RAMSEY said:

“The provision of Section 102, L. O. L., providing that the amendment of a pleading shall not substantially change the cause of action or the defense, *does not apply to amendments made before trial*. It applies only to amendments made during the trial.”

See *Talbot v. Garretson*, 31 Or. 256 (49 Pac. 978), and *Mallory v. City of Olympia*, 83 Wash. 499 (145 Pac. 627).

As we view it, the amendment was properly allowed in the discretion of the trial court. No new facts were set up in the amended complaint, and

the defendant was not prejudiced by the change in the pleading.

2. The amended complaint averred and the testimony on the behalf of plaintiff tended to show, that the defaults on the part of defendant, Supple, in the performance of the original contract were so numerous and so vital that they caused the plaintiff, Wakefield, to perform his labor under different conditions, at a different time, and in a different manner, than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon, that plaintiff, Wakefield, was not required to accept the compensation fixed in the original contract as the measure of his recovery; but by reason of the important changes in the work to be done and the defaults on the part of defendant, Supple, in his performance of the contract, plaintiff was entitled to recover in addition to the contract price such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant. There was no error in denying the motion for nonsuit: *Hayden v. Astoria*, 74 Or. 525 (145 Pac. 1072); *Id.*, 84 Or. 205 (164 Pac. 729).

3-7. Error is claimed on admission of testimony referring to the condition of the steel for the construction of the dredges at the time of its arrival in Portland, when it was delivered by defendant, Supple, to plaintiff, Wakefield, as to the lack of numbers on the different parts of the material to show how they were to be put together, and the lack of paint on the steel, so that the numbers would not come off. The testimony clearly showed that about 75 or 80 per cent of the numbers had dropped off in transporting the steel from Michigan to Portland, Ore-

gon, by reason of exposure to the elements and the erosion of the steel, making it very difficult and practically impossible to place the several parts on the dredge or assemble the same, and rendering the assembling of the parts, according to the testimony, like a "Chinese puzzle," and taking two or three times as long to perform the work as it would if the material had been properly painted and marked and increasing the cost in the same proportion.

We think that we should start with the premise that the plaintiff was entitled under the contract to have the material delivered to him in a reasonably suitable condition for assembling. Over the objection and exception of the defendant's counsel, Mr. S. R. Booth, a witness for plaintiff, was permitted to testify thus:

"Q. What is the fact as to steel which has been painted and the numbers put on top of that, and shipped from back in Michigan or that distance, as to whether those numbers on top of the paint would stay on or not?

"A. Oh, those numbers always stay on."

Defendant complains that over his objection and exception the court permitted testimony to be introduced explaining the meaning of the word "fabricated," as used in the contract between Supple and Wakefield, whereby Supple agreed to "deliver f. o. b. cars, all of the steel work for hull, fabricated and ready for erection, but not riveted, nor bolted up, and all of the steel work for trusses and ladder, fabricated and riveted, but not assembled," which tended to show that, according to the term as used "by the trade," the material when fabricated would go together in a good workmanlike manner. For the proper construction of an instrument the circum-

stances under which it was made, including the situation of the subject of the instrument and of the parties to it, may be shown, so that the judge will be placed in the position of those whose language he is to interpret: Section 717, L. O. L.

The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is admissible to show that they have a technical, local, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement shall be construed accordingly: Section 718, L. O. L. It is competent to introduce testimony to supply those terms actually agreed upon by the parties to a written agreement, but not contained in nor conflicting with an incomplete written contract: Section 713, L. O. L. The contract in question did not state when the material was to be delivered. There was much controversy over this point: See *Hayden v. Astoria*, 74 Or. 525 (145 Pac. 1072); *Id.*, 84 Or. 205 (164 Pac. 729); *American Contract Co. v. Bullen Bridge Co.*, 29 Or. 549 (46 Pac. 138); *Stuart v. University Lbr. Co.*, 66 Or. 546 (132 Pac. 1, 1164, 135 Pac. 165); *Holmboe v. Morgan*, 69 Or. 395 (138 Pac. 1084); 17 Cyc. 741; 2 Elliott on Contracts, § 1634.

Numerous other objections and exceptions were saved by defendant to the introduction of the testimony, which we do not deem necessary to set forth in this memorandum. We find no reversible error in the admission of the testimony.

8. The testimony on behalf of plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract, which made the labor more burdensome and extended the same to two or three times the amount it would ordinarily have been, if the material had

been delivered at the time and in the condition agreed upon. Therefore the plaintiff could properly recover upon a *quantum meruit*: *Hayden v. Astoria*, 74 Or. 525 (145 Pac. 1072); *Id.*, 84 Or. 205 (164 Pac. 729); *Gray v. Jones*, 47 Or. 40 (81 Pac. 813); *Demott v. Jones*, 2 Wall. (69 U. S.) 1 (17 L. Ed. 762, see, also, Rose's U. S. Notes); *Salt Lake City v. Smith*, 104 Fed. 457 (43 C. C. A. 637).

9. Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that, in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through. A similar question was carefully considered by Mr. Justice McCAMANT, in *Hayden v. Astoria*, 84 Or., at p. 220 et. seq. (164 Pac. 729). See *Sweeney v. Jackson County*, 93 Or. 96 (178 Pac. 365).

10. It was the claim of defendant, as asserted in his pleading and by his testimony, that the increase in amount of time consumed for the labor was caused by the fault of plaintiff. The issues in that regard were squarely raised, and were determined by the verdict of the jury. We are not concerned in the conflict of the testimony.

11. It is contended on behalf of defendant that there were only two deviations from the original

plan of the contract, and that as a matter of law the deviations were not numerous enough to abrogate or change the original contract. Such a departure from the original contract cannot be determined by the number of deviations, as one important change might render the contract an entirely different one. The testimony tended to show that the steel, when delivered to Wakefield, was "partly fabricated" or in process of fabrication. Let us suppose that it had not been "fabricated" or prepared for erection at all. That would have been but one change, and yet it would entirely change the agreement of the parties, and the plaintiff would not have been required to construct the dredges for the same compensation mentioned in the written contract.

Exception is also saved to the introduction of testimony as to the number of rivets to be driven to the ton of steel. This question was practically eliminated from the case by the instructions of the court to the jury as stated in appellant's brief.

Wakefield proceeded with the construction of the dredges after the failure of the defendant to deliver the material as agreed, at the urgent request of defendant, Supple, and was entitled to recover a reasonable compensation caused by the changes referred to, upon the same principle that a contractor is entitled to recover for extra work performed in addition to the contract.

The cause has been tried by two juries. Two verdicts in favor of plaintiff have been rendered. We find no reversible error in the record. The judgment of the lower court is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and JOHNS, JJ.,
concur.

Argued April 27, demurrer sustained and action dismissed June 8, 1920.

STATE Ex INF. v. PARKEY.

(190 Pac. 319.)

**Waters—Farmers' Domestic Water District—Election of Officers—
Ballot Title.**

1. Under Laws of 1917, page 721, Section 3, relating to the organization and election of commissioners of a water district, prescribing as a ballot title "Shall that portion of ——— county, * * be incorporated as a municipal corporation for the purpose of obtaining water for domestic use for its inhabitants and to be known as," followed by the proposed name, and providing that the affirmative should be numbered 300 and the negative 301, a ballot entitled "For Incorporation of Farmers' Domestic Water District," vote "Yes" or "No," was not such a departure or irregularity as to invalidate an election, as its form could not be misleading.

Original Proceedings in Supreme Court in *quo warranto*.

In Banc.

This is an original action in the nature of *quo warranto* to determine the right of the defendants to act as commissioners of Farmers' Domestic Water District. Upon the petition of the district attorney an alternative writ of *mandamus* issued out of this court, directing the defendants to abandon their claim to the office of commissioners, or to show cause why they should not. The defendants demurred to the complaint, and the cause is now submitted thereon.

DISMISSED.

Mr. Lewis H. Irving, on petition for plaintiff.

Mr. W. A. Johnson, for defendant.

Mr. Arthur A. Murphy, appearing *amicus curiae*.

BENSON, J.—The County Court of Jefferson County, upon a proper and sufficient petition, ordered an election to be held in certain specified territory in such county, upon the question of incorporating a municipal district for the purpose of supplying the inhabitants with water for domestic purposes; the proceedings being had under and by virtue of the provisions of Chapter 346 of the General Laws of Oregon for 1917. The election was held, resulting in a majority vote in favor of the organization, and choosing these defendants as the commissioners of the district so organized. Plaintiff attacks the validity of the election upon the ground that the form of ballot used does not comply with the requirements of the statute. The accuracy of the ballot is challenged in two particulars: (1) That it did not contain the ballot title required by the statute; and (2) that the ballot numbers used were not those specified in the act.

Section 3 of the act under which the election was held contains the following:

“The ballot title to be used at such specified election shall read as follows:

“Shall that portion of — county, State of Oregon, * * be incorporated as a municipal corporation for the purpose of obtaining water for domestic use for its inhabitants and to be known as — (here insert proposed name) in accordance with the provisions of that certain act of the legislative assembly of the State of Oregon, passed at its regular session held in 1917, entitled ‘An act to authorize communities to incorporate for the purpose of supplying their inhabitants with water for domestic purposes; to issue, sell and dispose of bonds and other securities, levy taxes and have the right of eminent domain for such purpose?’”

It further provides that—

“The affirmative of the measure on the official ballot shall be numbered 300 and the negative shall be numbered 301, both in numerals.”

The preparation of such ballot is by the act intrusted to the county clerk. That officer, in the present instance, appears to have performed his part of the work without any serious consideration of the statute, since, instead of using the prescribed ballot title, there was substituted this: “For incorporation of Farmers’ Domestic Water District Vote ‘Yes’ or ‘No.’ ”

Instead of using the ballot numbers “300” and “301,” there were substituted the numbers “12” and “13.” These two departures from the statutory directions constitute the sole basis of the action. The ballot which was used contained, at its head, in bold type, these words: “Official Ballot, Special Election, Farmers’ Domestic Water District, Held on Tuesday the 14th day of October, 1919.” This was followed by a specification of the polling place, and a detailed description of the territory to be included in the district. The only matters to be voted upon were the incorporation of the district and the selection of commissioners to manage its affairs.

The first question to be considered is: Does the omission of the prescribed ballot title invalidate the election? This question has been definitely answered by this court in the case of *Kiernan v. Portland*, 57 Or. 454 (111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 332). In that case, the municipal ordinance required that the ballot should contain the words, “Charter amendment submitted by the council,” and it was urged that the omission of them from the ballot rendered the election void. Speaking for the court, Mr. Justice McBRIDE says:

“It may be conceded that these words should have been printed upon the ballot, and that the ordinance requiring this to be done is in a sense mandatory upon the officers charged with the duty of preparing the ballot; but it does not follow that a failure in this respect rendered the election void. The omission could have misled nobody, as the important question for the voter to decide was, not who introduced the measure, but what its real merits were.”

So, in the present case, the ballot, we think, contained sufficient information to fully advise the electors as to the question which was to be determined by their votes, and it seems clear that nobody could have been misled by the omission.

The contention regarding the use of other ballot numbers than those specified in the statute is disposed of in like manner, by the opinion of this court in *State ex rel. v. Kelsey*, 66 Or. 70 (133 Pac. 806), which was a case wherein the city ordinance directed that the ballot numbers should be “400” and “401,” while the ballot as prepared, used the numbers “10” and “11.” It was there held that the ballot otherwise clearly notified the voter as to how he was to vote, and that nobody could have been misled by the error.

It is to be regretted that county officials should be guilty of the negligence in the preparation of this ballot, when a strict compliance with the requirements of the law would have been so simple and easy; but we must conclude, upon authority, that the assigned defects do not render the election void, and the demurrer is therefore sustained, and the action dismissed.

DEMURRER SUSTAINED.

Justice BURNETT, not sitting.

Argued December 9, 1919, modified January 27, modified on petition for rehearing and rehearing denied June 15, 1920.

HARTMAN v. PENDLETON.*

(186 Pac. 572; 190 Pac. 339.)

Charities—Ambiguity as to Beneficiary Latent.

1. Any ambiguity as to beneficiary of bequest in trust to use the income for benefit of the library of the Commercial Association of Pendleton, of the City of Pendleton, Or., is latent.

Charities — Extrinsic Evidence as to Beneficiaries Intended Inadmissible.

2. Under the rule that, where the language of a will is clear and of well-defined force and meaning, extrinsic evidence of intent is inadmissible to explain, enlarge, or contradict such language, the bequest being in terms for the library of the Commercial Association of Pendleton, of the City of Pendleton, if when the will was executed there existed an organization known by that name, and it owned a library, it may not be shown that the Pendleton Public Library was intended to be the beneficiary.

Associations—May Take and Hold Personal Property.

3. Unincorporated associations may take and hold personal property, at least to the extent that persons giving or selling the same to it may not retake or otherwise dispose of it.

Charities—No Latent Ambiguity as to Beneficiary Under Evidence.

4. Evidence held to show that at the time of making of a will making a bequest in trust for the benefit of the library of the Commercial Association of Pendleton such association owned a library, so that there was no latent ambiguity as to the beneficiary.

Charities—Trustees Authorized to Make Purchases for Library.

5. A bequest to trustees of money to be invested by them and the income "to be used by them for the benefit of the library" of a certain association does not require them to pay the income to the association, but they may select and purchase the books or supplies.

Charities—"Annual Income" to be Used by Trustee Means Annually.

6. Under bequest to trustees of money to be invested by them "and the annual income * * to be used by them" for the benefit of a certain library, it is their duty to apply the income annually, and not accumulate it.

Charities—Trustee not Chargeable With Costs.

7. A testamentary trustee of a fund for the benefit of a library, having with two claimants thereof refused to pay the income to the one entitled, but accumulated, not acting in bad faith, but on

*On the question of enforcement of general bequest for charity or religion, see note in 14 L. R. A. (N. S.) 49. REPORTER.

his honest conviction, should not be charged with the costs of the suit to determine right; it being a case which could not be decided at first blush, but only with the most careful deliberation.

ON PETITION FOR REHEARING.

Charities—Action—Accumulated Funds—Treated as Capital.

8. Where, owing to controversy as to who was beneficiary of a library fund, intended annual expenditures were halted and accumulations not expended, so that the amount accrued, not including the principal, aggregates more than double the amount of the original fund, such fund will not be used all at once in the purchase of books, thus leaving the library to depend on a small income provided by an amount of \$5,000 bequeathed for its support, but the whole amount will be treated as principal, and the annual income applied to purchase of books and supplies.

[As to gift for public works as valid charitable gift, see note in *Ann. Cas.* 1914A, 1218.]

From Umatilla: GUSTAV ANDERSON, Judge.

Department 1.

This is a suit primarily to have interpreted a certain clause in the will of Samuel P. Sturgis, deceased, and arises out of the following circumstances:

On the seventh day of January, 1896, Samuel P. Sturgis executed in due form a will containing the following provision:

“I give and bequeath to James A. Fee and Edward D. Boyd, as trustees, the sum of Five Thousand (\$5,000.00) Dollars in trust, to be invested by them and the annual income derived therefrom to be used by them for the benefit of the library of the Commercial Association of Pendleton, of the City of Pendleton, Oregon, but if from any cause said Commercial Association of Pendleton ceases to exist for a period of three years, then all of said five thousand dollars shall revert to my estate and become the property of my wife, Lina H. Sturgis, in fee simple.”

A month later Samuel P. Sturgis died from the sickness from which he was suffering when the will was executed.

We have now practically two claimants to the benefits of this bequest, namely: the City of Pendleton, for the purpose of its municipal library, and the Commercial Association of Pendleton, for the benefit of its library.

The Commercial Association of Pendleton claims that it is the beneficiary under the terms of the will, while the defendants claim that the Pendleton Public Library, at present a municipal institution of the city, is the beneficiary. The surviving trustee under the will, taking the latter view and desiring to expend the income of the trust funds for the purposes of the library of the Pendleton Public Library, the Commercial Association, by its library committee duly authorized so to do, commenced this suit to have the will interpreted, making the City of Pendleton, the members of its library board and Judge James A. Fee, the surviving trustee, parties defendant, all of whom answered setting up the claim of the Pendleton Public Library to the bequest. MODIFIED.

For appellants there was a brief with oral arguments by *Mr. James A. Fee, Mr. Richard W. Montague* and *Mr. Stephen A. Lowell*.

For respondents there was a brief over the name of *Messrs. Raley & Raley*, with an oral argument by *Mr. James H. Raley*.

McBRIDE, C. J.—This suit is not brought to correct an alleged mistake in the will of Samuel P. Sturgis. The plaintiffs claim that the testator made a perfect will, making it the beneficiary, and allege that defendants claim a different interpretation, whereupon it asks that the true purpose and intent

of the document be judicially declared. The defendants, on the other hand, claim that the Pendleton Public Library was the beneficiary and that there are ambiguous terms used, and ask a decree construing the will to mean that the trust fund therein provided was bequeathed to and belongs to the Pendleton Public Library, and that the same is the property of the people of the City of Pendleton.

1. If there is any ambiguity in the terms of the will it is latent and not apparent on the face of the instrument. Anyone ignorant of local conditions and controversies would, upon reading the clause in dispute, at once conclude that, (1) there was at the time an organization known as the Commercial Association of Pendleton; (2) that it had a library, (3) that its *habitat* was the City of Pendleton, Oregon, and (4) that it was the intent of the testator that the trustees named in the will should expend the income of the fund so bequeathed for the benefit of that library. If the first three of these conditions actually existed the fourth necessarily follows as a matter of law.

2. Before considering the testimony in the instant case, it may be well to advert to some firmly established principles laid down for the construction of wills, because there is no branch of judicature which, beyond this, so much requires adherence to those rules which the wisdom and experience of generations have developed.

The remark of TINDAL, C. J., in *Clarke v. Ludlam*, 7 Bing. 279, is one of universal application:

“I agree in the necessity of adhering to general rules in the construction of wills and other instruments. It is expedient that such rules should be held sacred, because they withdraw the decision from the discretion of the individual judge, and pre-

vent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule than in the confusion which must follow on departing from it."

One of these rules is this: Where the language employed in the will is clear, and of well-defined force and meaning, extrinsic evidence of what was intended in fact cannot be adduced to explain, qualify, enlarge or contradict this language, but the will must stand as written.

Applied to the concrete case, if there was in fact in Pendleton, Oregon, a library of the Commercial Association of Pendleton, extrinsic evidence cannot be introduced to show that the testator intended that "The Pendleton Public Library" was to be the beneficiary. The pivotal question in this case, therefore, is: Was there in existence at the time this will was executed an organization known as the "Commercial Association of Pendleton," and did it own a library? If these two facts existed they settle the contention in favor of the plaintiff. If either is wanting, then it will be proper rather than the bequest should be allowed to fail because of an equivocal description, for the court to seek in extrinsic evidence an interpretation of the testator's intention.

Thus, *In re Taylor*, 34 Ch. D. 255, where the testator devised property to "My cousin Harriet Cloak," when in fact a cousin of that name had been married and no longer bore it and there was another Harriet Cloak, the wife of a cousin of the testator, parol evidence was admitted to show that the latter was the person for whom the legacy was intended.

And in *Gilmer v. Stone*, 120 U. S. 586 (30 L. Ed. 734, 7 Sup. Ct. Rep. 689, see, also, *Rose's U. S.*

Notes), where a residuary estate was given for equal division "between the Board of Foreign Missions and the Board of Home Missions," and it appeared that there were such boards in various religious denominations, evidence was admitted to show that the testator, being a zealous Presbyterian, must have intended the bequest for boards of that denomination.

On the other hand, if there is in existence a party of the name designated in the will, extrinsic evidence will not be admitted to show that another party with a different though closely similar name was intended.

Thus in *Tucker v. Seaman's Aid Society*, 7 Metc. (Mass.) 188, where one Nathaniel Tucker gave a legacy to "The Seaman's Aid Society in the city of Boston," another society, "The Seaman's Friend Society," in the same city claimed the legacy and offered evidence to prove that the testator had no knowledge of the existence of the society named in his will; that he knew of the existence of said other society, was deeply interested in its objects, and had contributed to its funds and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will to insert the legacy, as made to said society; that the scrivener, not knowing the existence of said society, told the testator that the name of the society was the "Seaman's Aid Society" and the testator thereupon submitted to having that name inserted. The Supreme Court held the evidence to be inadmissible and sustained the bequest as it appeared in the will. The opinion of Chief Justice SHAW completely covers every phase of the proposition here discussed, and it is unnecessary to cite other precedents.

It being conceded in this case, that when the will was executed there was in existence in the City of

Pendleton an organization known as the "Commercial Association of Pendleton," we pass to the vital proposition in this case. Did the association at the time have a library? We must, from the terms of the bequest, assume that the testator thought there was a library connected with the association because the bequest is conditioned upon the continued existence of the Commercial Association. The testator says:

"If, from any cause, said Commercial Association of Pendleton ceases to exist for a period of three years, then all said five thousand dollars shall revert to my estate."

This is not the language of a man making a gift to the general public. If the Commercial Association was not the ultimate party to be benefited, why make the bequest contingent upon the continued existence of that association. If a testator makes a bequest in favor of A., it would not be unnatural that he should provide that in case of A.'s death, the money should revert to the testator's estate, but if the bequest should be made to A. with the provision that it should revert in case of the death of a stranger, the sanity of the testator would be questioned.

Here the bequest is a Siamese twin to the Commercial Association. It dies with it or at least as soon thereafter as the lapse of time has demonstrated that the association is dead beyond revival. To the writer this is strong evidence that the ultimate benefit of the bequest was intended for the Commercial Association, and that while no doubt the testator expected and hoped the people of Pendleton would share in that benefit, he expected that benefit to flow through the channel of the Commercial Asso-

ciation and not otherwise. He thought, and nobody was perhaps better acquainted with the facts, that the Commercial Association and not the public generally owned a library, and that through the trustees he had appointed that library would be kept up primarily for the benefit of the association and incidentally perhaps for the general public.

3. We take it to be fairly well-settled law, at least by the better authorities, that an unincorporated association may take and hold personal property at least to the extent that the person giving or selling such property to it cannot retake it or otherwise dispose of it; so that if one gave a book, or money to buy a book, to the Commercial Association for its library, that person could not retake the book or reclaim the money on the pretext that the donee was incapable of holding it. Such associations would be treated in equity as *quasi* partnerships, each member of which would be entitled to an interest in the property donated or purchased: 5 R. C. L. 312; *Whipple v. Parker*, 29 Mich. 369; *Curtis v. Hoyt*, 19 Conn. 154 (48 Am. Dec. 149); *Snowden v. Crown Cork & Seal Co.*, 114 Md. 650 (80 Atl. 510, Ann. Cas. 1912A, 679), and note to case, as reported in the last-mentioned work. There is not a solitary reason for the holding of some courts that gifts to nonincorporated associations are invalid, except blind adherence to outworn precedents.

The capacity of the Commercial Association of Pendleton to found a library being established, we now advert to the testimony relative to the actual existence of such a library at the time the will in question was executed. The first mention of a library in connection with the work of the Commercial Association, is found in its minutes of March 24,

1894, where it is recorded that the chair announced, among other matters, as one of the objects of the meeting that it was proposed to take up the matter of establishing a library, and the further recital that "all matters were placed under discussion and fully considered."

The discussion may have had some effect for on April 3, 1894, we have a statement in the address of Colonel Boyd, President of the Association, to this effect:

"In addition to all this a cabinet has just been placed in the middle room of the Association for the reception of books and periodicals, which it is desired to present, thus making a beginning for a library which is much needed in the city. Mr. C. S. Jackson has lately donated to the Association complete files of the Congressional Record for several years past and up to date, together with many valuable books for which he has placed this Association under obligation."

So far as the testimony shows, this donation of Mr. Jackson was the first thing beyond mere talk that occurred in the direction of establishing a public library in Pendleton, and it seems fair to assume that the books given by him were intended to become the property of the association. That he hoped and expected from this little beginning and the efforts of himself and others a library would develop which would, under the management of the association, be valuable to the association and of use to the general public, is apparent from his testimony, and while he perhaps did not give a thought as to where the legal title to the books presented by him would technically vest, it is plain he regarded the association as the donee.

On the same day that Colonel Boyd's address was delivered, to wit, April 3, 1894, an honorary membership in the association was instituted with a membership fee of \$20, and the fees so obtained were set aside as a sinking fund for the purpose of establishing a library, and a committee consisting of James A. Fee, Fred R. Mellis and Jesse Farling was created under the designation of a "library committee."

On March 27, 1894, Judge Fee, in an interview with a reporter of the East Oregonian newspaper, urged the formation of a public library in Pendleton, under such auspices as should secure permanency, and suggested tentatively that the Commercial Association should take the matter up and devote a certain sum to the support of it as well as to the augmentation of the volumes upon the shelf. He suggested that no member then active in the organization would be any the less attracted to the rooms of the association, and that no doubt many others would become members because they would then know that the fees and dues would go to the support of an institution which was broad and reaching out to build up the community in a literary as well as social and business way. If the association could not do this, then he suggested that some other non-sectarian institution, which all citizens might join with in building up a creditable library, should undertake the work. The suggestion was approved editorially as one which should be acted upon to the end that Pendleton might have a public library.

On March 31, 1894, a social organization known as the "Columbian Congress" held a banquet, at which the sum of \$75 over expenses was realized and at the motion of Judge Fee this sum "was turned

over to the Commercial Association to be used as a nucleus in starting a reference library for the use of the city."

On May 1, 1894, the library committee reported to the association that they had secured subscriptions in the sum of \$600 and asked the association for instructions in regard to the plan of carrying on the library work. They were given a vote of thanks and directed to formulate a plan for carrying on the library and directed to report at the next meeting.

On May 4 or 5, 1894, a library festival was held in aid of the library. In the papers of that date the event is spoken of as having been brought about by the labors of the "Commercial Association Library Festival Committee, Messrs. Fee, Mellis and Failing." The testator, Mr. Sturgis, presided and about \$1,700 in money and books was subscribed. The newspaper article congratulated the city on the fact that Pendleton had a library promised and the means of securing it assured.

At a meeting of the association on June 12, 1894, it was moved and carried that the secretary be instructed to prepare an amendment to the by-laws making the library committee a permanent one, but there is no record that this was ever done.

On November 6 and December 4, 1894, the committee reported progress and on January 9, 1895, reported the purchase of books and the preparation of shelves. On February 12, it was moved and carried that the library be insured for \$1,000. On March 5, 1895, it was moved and carried that members of the association pay no fees or dues to the library in consideration of the association bearing its expenses, and at the same meeting it was ordered that the library committee be empowered to

adopt such rules and regulations as are necessary to conduct the affairs, and that Colonel Boyd be added to the library committee, and that the library be opened on the succeeding Monday.

On March 9, 1895, rules and regulations governing the control of the library were promulgated by the library committee. These rules, as a whole, are similar to those governing all public libraries but contain provisions, which, standing by themselves would seem to rather favor defendant's contention that the Commercial Association was merely the host so to speak of another association called the "Library Association." The rules are entitled, "Library Rules and Regulations under which books may be read and taken from the rooms."

The provisions above alluded to are as follows:

"1. The Commercial Association agrees to furnish a room for library purposes and a room in which members of the Library Association may read during the afternoon of each day from two o'clock until five, except Sundays, legal holidays and days upon which special meetings of the Commercial Association may be called, and to furnish lights, fuel and a supply of current literature for library purposes, and to pay a librarian for caring for said library, and as a consideration for the benefits of the library the members of the Commercial Association, both active and honorary, who are in good standing, shall be entitled to membership in the Library Association, without the payment of any additional dues or fees.

"2. Any person of good moral character and deportment shall be entitled to membership in said Library Association upon the payment of \$2.50 initiation fee, and 25 cents monthly dues payable monthly in advance."

Judge Fee, who took a prominent and perhaps the leading part in procuring subscriptions of money

and books for the library, states that according to his recollection of the circumstance, a contract was drawn at the same time the rules were prepared, whereby the Commercial Association agreed to furnish rooms, light, janitor and librarian services, and for that concession the members of the Commercial Association became members of the Library Association without payment of other dues or fees, while other persons not members of the Commercial Association were required to pay a membership fee of \$2.50 and 25 cents a month as dues. His view and recollection of the whole matter may be summed up in the following excerpt from his testimony on cross-examination:

“Q. Then the minutes of March 6, 1900, * * appears: ‘President Fee appointed the following committee, Library committee, Guernsey, Boyd, Foster, Lowell and Smith,’ Would you say that was true?

“A. Yes, sir; I think possibly that is true but that is nearly six years after the library was founded, Colonel, however, being President of the Association didn’t change my views as to the Sturgis books and didn’t change my views that the Commercial Association did not own that library, but that it belonged to the people of the city of Pendleton who had paid for it.

“Q. After that was your view of it, or if that was your view of it, why was it being conducted and under what arrangement was it being conducted by the Commercial Association?

“A. I have explained that, Colonel, we got together and as the result of a conversation between myself and Mr. Sturgis the movement was started and after it had gotten along further and it became a thing to be dealt with on behalf of the public, the committee was appointed to solicit funds and it was then understood that the library belonged to the people and was to be a public library and that at Mr. Sturgis’ suggestion, as I recall it, the contract I

mentioned and the rules and regulations were prepared. Now as I intended to say, if I have not said it, Mr. Sturgis was a man of wide business experience and lest there should be any misunderstanding with the people who had originated the founding of the library he suggested that a contract be prepared, which I think was prepared and which was signed. As to the legal matters, whether myself and the other members on the library committee could enter into a contract with the Association at that time on behalf of the public is a question for the court. I thought we had that power and that is the capacity in which we were undertaking to act.

“Q. It is your contention there was a contract in existence between some one representing the Commercial Association and some one representing the general public whereby this arrangement was entered into?

“A. That is my recollection of having dictated that contract to Mr. Wheeler and that it was signed at the same time that the rules and regulations were dictated to go with that contract, and I think I stated in my remarks at the hall in 1908 at the time the library was transferred to the city hall, that the Commercial Association agreed to furnish rooms, light, janitor and librarian service and for that the members of the Commercial Association became members of the Library Association and other persons were required to pay two dollars and a half under the rules to become members of that Association, and to pay a monthly due of twenty-five cents for access to the library and that that is the way in which I have always believed that the two independent organizations existed, one representing the Library Association and being the Library Association which was the committee in the Commercial Association, and the Commercial Association itself being the other party.”

No contract of the character mentioned is found in the papers of the Commercial Association and Judge Fee kept no copy; neither is there anything

in the records or files of the Commercial Association indicating its assent to or authorization of such a contract. Judge Fee's recollection as to who signed the contract is indistinct, and while his word imports absolute verity so far as his recollection of a transaction occurring a third of a century ago extends, it is the experience of all of us that vague memories are unsafe as evidence, and in this case it is more than possible that the witness has confounded the preparation of the rules with the preparation of a contract, especially as the resolution under which the library committee acted, authorized them to prepare rules and regulations for the conduct of the library but made no reference to any contract with anybody.

It is difficult to see how the committee of the Commercial Association could contract with itself, or how any officer of the association could contract for the association without express authority and evidence of the making of such a contract would, at best, be only valuable as indicating the idea and intent of persons active in the matter, as to who were the real owners of the library. The same may be said as to the testimony of the many witnesses introduced, as to their understanding of the situation when donations for the benefit of the library were made.

A large number of witnesses who were in a position to know, including officers and charter members of the Commercial Association, and the widow of the testator, testified that their understanding had always been that the library was the property of that association. A less number, though with equal means of knowledge, testified that their understanding was that the library was the property of the peo-

ple of the City of Pendleton, and that they would not have made the donations had they understood that the Commercial Association was to be the owner of the books. The fact is apparent that little thought was in fact given by subscribers to the fund and donors to the library as to what body was to be the technical legal owner of the library. The Commercial Association was composed of the leading citizens of Pendleton and had the confidence of the public. When it assumed to take the lead in organizing a library everybody was satisfied that it would act fairly by the public, and that irrespective of the question of technical ownership the public under reasonable rules and restrictions would have access to it.

No one seems to have expected that the library would be a free library in the sense that everyone could have the use of it without money and without price, and, although from the beginning the rules promulgated required the payment of a membership fee and dues, we hear of no objection to this requirement.

There were no officers or agents of the library selected by the public, or any association of the public, except the Commercial Association. It appointed the library committee and the librarian and reports were made to it. It insured the books. If it was not the owner of the legal title it is difficult to say where that title was lodged. It could not reside in the committee appointed by the association, nor in the librarian who took care of the books, nor the janitor who swept the rooms and dusted the shelves. It was not in the persons who contributed the money to purchase books, or in those who donated books; each one of these, when he made his contribution

and parted with possession of the thing contributed, was divested of the legal title thereof. He could not sue in his own name to replevin the books contributed, even from an outright thief. The Commercial Association might sue, and so far as we can see it was the only party who could have sued. In its capacity as an association it could own a library but by a long series of decisions, which seem to have crystallized into law, it could not be the trustee of a library for the use of someone else.

4. From all the testimony the salient points of which we have attempted to indicate, we conclude that the Commercial Association had a library at the time the will was made. It was certainly the owner of the books contributed by Mr. Jackson before any other contribution was made, and we are of the opinion that the weight of the evidence indicates that the bulk of the contributions thereafter made, were intended to be to the Commercial Association, with the expectation that it would apply them to the upbuilding of a library to which the citizens of Pendleton would be permitted to have access. The name which the library received is not material. It was sometimes called the Commercial Association Library, but most frequently the "Pendleton Public Library," a name which was probably suggested by the testator who was active in promoting it. The library was public and was located in Pendleton and the name was appropriate, but giving that name did not dedicate it to the free use of everybody nor transfer the title to the municipality.

We conclude that at the time the testator made the will in question, there was in the City of Pendleton a library owned by the "Commercial Association of Pendleton," and that it was the intention of the tes-

tator to make that library the beneficiary. As before remarked, there is no ambiguity on the face of the will. It can only be rendered ambiguous by assuming that the Commercial Association of Pendleton had no library and that therefore the testator must have intended the bequest to apply to some other institution. If the association had a library, whether of twenty or twenty thousand volumes, the bequest must stand as written and as we have attempted to show it did have a library, and it is evident from the concluding clause of the bequest, which made it contingent upon the continued existence of the Commercial Association, that this library was in the mind of the testator when he made his will and that there was probably in his bequest the double motive, first to make the association—of which he was an enthusiastic member—attractive and interesting, and, second, to benefit the community which was enjoying the benefit of the library already installed, and perhaps further to insure the permanency of both the Commercial Association and the library.

But it is useless to speculate upon the motives which may have influenced the testator in making the bequest. There was in existence in Pendleton a library of the character described in the will and that fact being ascertained, it follows as a necessary consequence that we cannot divert the bequest to some other institution. It is very probable that were the testator making his will to-day, or if it had been made in 1908, the present library of the City of Pendleton would have been the beneficiary, but we are dealing with the situation as it appeared to the testator in 1896, and viewing that situation in the light of the evidence we are of the opinion that the

library of the Commercial Association, the library then in its rooms and to which we find it had the legal title, was the one for the benefit of which the trustees were required to expend the income from the bequest.

Concerning the propriety of removing the library from the rooms of the association to the city hall and thereafter to the Carnegie Library building, we express no opinion. Perhaps these removals were the best that could have been done under the circumstances, and it is possible that if the last removal had been made openly much of the exasperation and ill-feeling, which has crept into this contest, would have been avoided.

We find that the Commercial Association of Pendleton is entitled to the custody of the books removed from the Commercial Association's rooms to the city hall, and to all books since purchased with funds from the Sturgis bequest.

The fact that the association consented to the removal of the books to the city hall does not, from the evidence, appear to have been a gift or a relinquishment of title, but a mere expedient to place the library in a place where it would be more accessible to the public, and the fact that since that time the Commercial Association has not interfered in its management, must be referred to the conditions under which the books were obtained in the first place. There is no convincing, if indeed any, evidence of an intent on the part of the association to make a gift of these books to the City of Pendleton, and under the circumstances there was no necessity for it to interfere in the management of the library in its new location.

5. We do not interpret the will as requiring the trustees to pay over the income of the fund to the Commercial Association, or its library committee, to be by them expended. The bequest is to the trustees, and we think it was the intention of the testator that *they* were the persons who should use the fund for the benefit of the library. If in their judgment, it seemed proper to turn the income over to the association, or its library committee, to be in that way expended for the purchase of books or supplies, they had a right to do so; but we are of the opinion that if such a course should seem best, the trustees themselves had a right to select the books or supplies and to purchase them. The trustees were both gentlemen of more than ordinary literary acquirements and therefore well qualified to appraise the needs of the library and to select accordingly; they were close friends of the testator and the fact that he selected them as trustees, instead of making his bequest to the association itself, or providing that the funds should be managed by trustees selected by the institution, or by its library committee, indicates that he intended that they were the persons in whose judgment the testator intended to place discretion as to the expenditure of the money derived from the income of the fund created. The language of the bequest supports the construction above indicated, "the annual income derived therefrom to be used by them (the trustees) for the benefit of the library," etc.

6. Another contention arises over the construction of the words "annual income." It is contended by plaintiffs that these words indicate that it was the intention of the testator to require the trustees to expend the income annually for the benefit of the

library. We are of the opinion that it was the intention of the testator that the income should be applied annually and not hoarded. There is a dearth of authority on this subject and we have not been able to find any case in which the phrase has been construed in connection with a case arising out of a bequest, although the tendency of the courts seems generally against permitting accumulations unless specifically provided for in the will. The question is difficult of solution upon precedent.

A case similar in principle is that of *Catlin v. Lyman*, 16 Vt. 44, in which it is provided that the maker of a promissory note would pay the sum stated in ten years "with annual interest," and on behalf of the maker it was contended that the word "annual" used as an adjective was intended to modify interest, and meant only the computation of interest by annual rests, and that the whole amount, principal and interest, did not become due until ten years from date; but it was held that the contract would not be so construed, but that "annual interest" in legal contemplation was the same as if written "interest annually," and that the interest on the note was due and payable each year.

The same principle seems applicable here, and was evidently so understood by the trustees who honored the requisition of the library committee for books, until a misunderstanding arose to which we shall presently advert. We conclude that it was the duty of the trustees to apply the income of the fund annually to the needs of the library so long as it should be maintained by the association, or until it had ceased to exist. This conclusion suggests difficulties and is one upon which courts might differ, but taking into consideration the general rule as to the vest-

ing of bequests, and the particular circumstances existing at the time the will was executed, we conclude that the construction we have adopted expresses the intent of the testator. This leads to an affirmance of the decree, except so far as it allows the *cestui que trust* to select the books.

7. Another question arises as to costs and as to that we think it would be unfair to compel the defendant, who has, from his point of view, only striven to protect the fund, to pay the expense of defending this action. His management has been painstaking and admirable. In his hands, in addition to a considerable expenditure for books, the fund has trebled in amount. He has given his time and credit to increasing and protecting it. His motives have been misconstrued and his integrity assailed for doing what he has no doubt thought his dead friend desired him to do in relation to the matter, and the association no doubt will now be able to secure a better library than if it had received the annual dribblets from an uncertain income.

In addition to this he had learned from Colonel Boyd, his cotrustee, that about \$400 of the library fund of the association had been transferred to the general fund and this impression, whether well or ill founded, seems to have created some distrust as to the proper application of the bequest by the library authorities. It is due to the association to say that there is no direct evidence that the conversion ever took place or that if it did it was in any way a breach of trust or of its professions to those who had aided in building up the library.

There is one transaction which, unexplained, probably impressed the mind of Colonel Boyd and afterwards, when he reported it to Judge Fee, also raised

a suspicion in his mind that the funds dedicated to the use of the library were being expended for other purposes, and that circumstance appears on the record as follows: In April, 1894, when the question of establishing a library was being discussed, and before any large contributions for that purpose had been made, a by-law was passed providing for the admission of honorary members of the association at a fee of \$20, which fees were to constitute a sinking fund for the purpose of establishing a library. This was in April, 1894. In November, 1896, several months after this bequest became effective by the death of the testator in February of that year, it was resolved by the association that the sinking fund be abandoned and the money turned into the general fund. This, on the face of it, would appear to have been a breach of faith with the testator, and other contributors, and while the transaction may have been perfectly fair and proper it has not been explained in the testimony and is possibly the transaction discussed by Colonel Boyd and reported to Judge Fee, and which caused him to withhold further contributions to the fund from the proceeds of the testator's bounty.

In any event we are satisfied that he did not act in bad faith but upon his honest convictions and with the intent to carry out the desires of the testator, as he understood them. This has not been so plain a case that this court has been able to decide it at first blush or indeed except with the most careful deliberation, and the trustee—with one part of the community demanding the application of the fund to one library, and another group of citizens to another—ought not to be mulcted in costs because he

waited for the advice of the court as to how he should apply it.

The decree will therefore be modified in so far as it provides for the recovery of costs from the defendant, and with the exception of the two modifications above referred to, the decree will be affirmed and the defendant directed to apply the accumulated surplus of the fund to the purposes of the library of the Commercial Association of Pendleton.

MODIFIED.

HARRIS, BENSON and JOHNS, JJ., concur.

Former opinion modified June 15, 1920.

PETITION FOR REHEARING.

(190 Pac. 339.)

On petition for rehearing. FORMER OPINION MODIFIED AND REHEARING DENIED.

Messrs. Raley & Raley, for respondents and for the petition.

Mr. James A. Fee, Mr. R. W. Montague and Mr. Stephen A. Lowell, for appellants, and also for the petition.

Department 1.

McBRIDE, C. J.—8. In our original opinion we held, after disposing of the question of costs as to the trustee, that the accumulations of the fund should be applied to the purchase of books for the library of the Commercial Association of Pendleton.

Upon petitions for rehearing filed by both parties, we find this practical difficulty in the way of carrying out such a decree: The amount now accumulated, not including the principal, aggregates more than double the amount of the original fund. To use this large sum at once for the purchase of books would be to fill it with editions which would soon be superseded, and leave the library to depend on the small income provided by annual interest on the original \$5,000 bequest for its support.

This being the case, it is the part of prudence to act with reference to conditions as they are, rather than to attempt the impossible task of enforcing the technical terms of the will. We say impossible, because the will substantially provided that the accumulations of the fund should be expended annually, and, owing to this controversy as to who was the beneficiary, such expenditure was halted; the accumulations were not expended annually, or at all for several years; hence the large sum now on hand.

We are of the opinion, under the circumstances, that it would be to the best interest of the library fund to add these accumulations to the principal, with certain deductions hereafter mentioned, and to treat the whole amount so accruing as principal, and apply the income thereafter arising annually to the purchase of books and supplies for the library. This course will furnish a larger annual income for the use of the library hereafter, and seems to us a much better business proposition than putting the whole sum now on hand immediately into the purchase of books.

From the accumulated income now on hand, it will be directed that \$1,200 be applied during the current year, ending December 30, 1920, for the purchase of

books and such other supplies as the trustee may deem proper. In addition, it is ordered that the plaintiffs be paid from the fund \$300 as attorneys' fees. The trustee, being somewhat in the position of a stakeholder between the city and the Commercial Association in this litigation, should not be required to pay his attorney wholly from his own funds, and will be allowed to compensate himself to the extent of \$250 from the accumulations to the fund. The plaintiffs will have a decree against the city for their costs and disbursements herein to the extent of \$150, or such lesser sum as may be taxed, otherwise the decree will be as indicated in our original opinion.

This disposes of the case, and we trust the animosities that this controversy has engendered will now be laid aside, and that all parties to it will work together to make the bequest of Mr. Sturgis an instrument of good in the community which he so generously remembered in his hours of sickness and in the shadow of impending death.

FORMER OPINION MODIFIED AND REHEARING DENIED.

HARRIS, BENSON and JOHNS, JJ., concur.

Argued March 12, affirmed April 13, rehearing denied June 15, 1920.

STATE Ex REL. v. STATE BOARD OF DENTAL EXAMINERS.

(188 Pac. 960; 190 Pac. 338.)

Physicians and Surgeons—Dentist License; "Practice Dentistry"; "Conduct Dental Office."

1. Dentist who was operating and maintaining a dental office in the state on January 1, 1919, was entitled to a license under Laws of 1919, page 177, Section 1, such statute not conflicting with Section 4777, L. O. L., as amended by Laws of 1919, page 175, pertaining to the right to practice dentistry, the right to conduct a dental office and the right to practice dentistry being separate and distinct, the one not including the other.

ON PETITION FOR REHEARING.

Physicians and Surgeons—Dentists—License to Practice—Necessity for.

2. Under Laws of 1919, page 177, one holding license or privilege only to conduct, manage, or maintain a dental parlor must confine himself strictly to such activities, maintaining an office, having all instruments and appliances, and employing competent dentists, but cannot himself engage in practice of dentistry or examination of patients without being also licensed to practice dentistry.

Physicians and Surgeons—Dentists—License—Statute.

3. Laws of 1919, page 177, requiring every individual or member of any firm, with certain exceptions, to obtain license to practice dentistry before engaging in conducting or maintaining a dental office or parlor within the state, is constitutional.

[As to constitutionality of statute requiring dentists to take out licenses as impairing vested rights of previous practitioners, see notes in 19 Ann. Cas. 833; Ann. Cas. 1914B, 399.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2.

This is a proceeding in *mandamus*. It is alleged that the relator is sixty-one years of age, a resident of Portland and a law-abiding citizen of good moral character; that he was born in Wisconsin and through his poverty was denied a college education; that in 1876 he entered the dental office of S. A.

Garber, at Tipton, Iowa, where he remained for six years and was engaged as a pupil, receiving from his preceptor practical knowledge and experience in the dental profession; that in 1888 he applied to the Iowa State Board of Dental Examiners for a license to practice in that state, which was granted him; that for nineteen years he practiced his profession in Iowa, during which time he was a member in good standing of the Iowa State Dental Society; that on January 1, 1919, and for some time prior thereto he was and now is engaged "in the actual business of conducting, operating and maintaining a dental office or parlor in the state of Oregon," in the City of Portland, and is engaged in the practice of dentistry; that he is competent, skilled and qualified to maintain such practice. It is then averred that on July 10, 1919, he made a duly verified application to the defendant for a license to practice dentistry in Oregon, which was supported by the affidavits of three qualified and disinterested citizens of the state, copies of which are attached to the petition, and that he tendered the required fee. He charges that the defendant wrongfully and unjustly refused, and continues to refuse, to issue such license to him; that by reason thereof he is compelled to practice his profession without a license; that the public views him with distrust and suspicion and regards him as unskilled and unqualified to practice dentistry; that it was the duty of the defendant to issue such license to him; and that his only remedy is by a writ of *mandamus*.

The defendant filed a general demurrer to the petition for an alternative writ, which was overruled, and then answered, denying all of the material allegations of the petition, and as a further and

separate defense averring that on July 10, 1919, the relator filed his written application for a license to practice dentistry, under Chapter 120, Laws of 1919; that he does not possess training and qualifications which entitle him to a license; that in September, 1917, he was convicted of practicing at Bend, Oregon, without a license; that he then agreed that on suspension of his fine he would never again practice without a license in this state; and that, if the relator did practice dentistry thereafter, as alleged, he did so secretly and without the knowledge of the defendant, in violation of his promise. It is then alleged that Chapter 120, Laws of 1919, does not provide that the defendant shall issue a license for the practice of dentistry; that the only license which could be given thereunder is one to conduct, manage and maintain a dental office in this state; and that the statute mentioned is void, meaningless and against public policy.

Replying, the relator denied all of the material allegations of the further and separate answer. On the issues thus framed, testimony was taken, and the court made findings of fact and conclusions of law, upon which it ordered that a peremptory writ of *mandamus* should be directed to the defendant commanding it to issue to the relator a license "to conduct, manage and maintain a dental office or parlor in this state," upon receipt of the annual license fee. The defendant appeals, assigning numerous errors, in particular that Chapter 120, Laws of 1919, is "void, unintelligible, meaningless and inconsistent, and in conflict with" Chapter 119, Laws of 1919.

AFFIRMED.

For the State there was a brief over the names of Mr. Louis E. Schmitt, Mr. George M. Brown, At-

torney General, and *Mr. Walter H. Evans*, District Attorney for Multnomah County, with an oral argument by *Mr. Schmitt*.

For respondent there was a brief and an oral argument by *Mr. John W. Kaste*.

JOHNS, J.—1. The first law on this subject was enacted in 1887 and is entitled:

“An act to regulate the practice of dentistry in the state of Oregon and providing penalties for the violation of the same”: Laws 1887, p. 97.

Section 1 of this act provides:

“Nothing in this act shall apply to any person engaged in the practice of dentistry or dental surgery in this state at the time of the passage of this act.
* * ,”

This was amended in 1899 (Laws of 1899, page 202) to read:

“ * * Provided, that said board may admit to examination such other persons of good moral character as shall give satisfactory evidence of having been engaged in pupilage and in the practice of dentistry in the state of Oregon prior to the passage of this act. * * All dental colleges which are members of the national association of dental faculties shall be deemed reputable and in good standing.”

Although the act was further amended in 1905, (page 209), 1909 (page 93), and 1913 (page 715), no change was made in the above provision. By Chapter 119, Laws of 1919, Section 4777, L. O. L., being the original act of 1887, was amended to read as follows:

“Any person desiring to practice dentistry in the state of Oregon after this act takes effect shall file his or her name, together with an application for examination, with the secretary of the board of dental examiners, and at the time of making such an

application shall pay to the secretary of the board a fee of \$25 and shall present himself or herself at the first regular meeting thereafter of said board, for examination as to his or her fitness therefor; and no person shall be eligible to practice the same unless he or she shall be shown to be of good moral character and shall present to said board his or her diploma from a dental college which is a member of the national association of dental faculties, or whose requirements for graduation, in the judgment of the 'state board of dental examiners,' are equal to that of a member of the national association of dental examiners; Provided, that said board may admit to examination such other persons of good moral character as shall give satisfactory evidence of having been engaged in pupilage and in the practice of dentistry in the state of Oregon prior to the passage of this original act. * * "

At the same session of the legislature, Chapter 120, Laws of 1919, was passed, entitled:

"An act to require every individual, or if a member of any firm, association, company or corporation, to obtain a license to practice dentistry before engaging, conducting or maintaining a dental office or parlor within this state."

The enactment is as follows:

"That every individual, or if a member of any firm, association or corporation, shall, before engaging, conducting, operating or maintaining any dental office or parlor, in any way, obtain a license to practice dentistry in this state; Provided, however, that any individual, firm, association or corporation engaged in the actual business of conducting, operating or maintaining any dental office or parlor in the state of Oregon, on January 1, 1919, shall upon proper proofs, by affidavits, of such fact, together with a statement of the names of the persons constituting the individuals, firm or association and the names of the stockholders of the corporation, presented to the 'state board of dental examiners,' be

exempt from the provisions of this act, and be issued a license by the state board of dental examiners, to conduct, manage and maintain a dental office or parlor, upon the payment to the board of the same annual license fee paid by licensed dentists.

“Any individual, or if a member of any firm, association, company or corporation, who shall engage, conduct, operate or maintain, in any way, a dental office or parlor, without first having obtained a license to practice dentistry within this state, as in this act provided, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars (\$50) nor more than two hundred dollars (\$200) or be confined by imprisonment for not more than six months in the county jail, or be both fined and imprisoned, for each and every offense.

“All acts or parts of acts in conflict herewith are hereby repealed.”

As a witness the relator admitted that on September 12, 1917, he was charged with practicing dentistry without a license at Bend; that he pleaded guilty and was fined \$50; that sentence was suspended on condition that he would not repeat the offense, but that he continued to practice thereafter at Bend; that in 1918 he moved to Portland, where he opened a dental office; that he is not a graduate of a dental college, and that he has never obtained a license in Oregon. He further admitted that he could not comply with the requirements necessary to obtain a license to practice. Hence we must assume that he does not have a license to practice dentistry and is not entitled to one.

Chapter 120, Laws of 1919, was House Bill 216 and is a companion of and a sequence to Chapter 119, House Bill 215. It appears from the legislative journals that Section 1 of Chapter 120 as it was introduced and passed the house did not contain any

proviso whatever; that it was amended in the Senate to include the modification above quoted, but was not otherwise changed, and that it was thereafter returned to and approved by the house. Although this proviso is in conflict with Section 2 and the title of the act, yet it is apparent that it was inserted in order to exempt from the statute "any individual, firm, association or corporation engaged in the actual business of conducting, operating or maintaining a dental office or parlor, in the State of Oregon on January 1, 1919," upon the terms therein stated. The record shows that on January 1, 1919, the relator was operating or maintaining a dental office in Portland. For this reason we agree with the trial court in its conclusion that he is entitled to maintain a dental office. It is the evident purpose of the proviso to permit such individuals to manage or conduct a dental office or parlor, as distinguished from those who may actually engage in the practice of dentistry; but a license merely to conduct an office does not carry with it the right to practice dentistry. They are separate and distinct, and the one does not include the other. If at any time the relator should fail to comply with the limitations of his license he would violate the law and subject himself to the prescribed penalties. The judgment is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ.,
concur.

Rehearing denied June 15, 1920.

PETITION FOR REHEARING.

(190 Pac. 338.)

Mr. Louis E. Schmitt, Mr. George M. Brown, Attorney General, and Mr. Walter H. Evans, District Attorney, for the petition.

Mr. John W. Kaste, contra.

Department 2.

McBRIDE, C. J.—The original opinion in this case will be found in 188 Pac. 960, not being as yet published in the Oregon reports.

Both parties file petitions for rehearing. The relator objects to that part of the opinion which contains the following language:

“It is the evident purpose of the proviso to permit such individuals to manage or conduct a dental office or parlor, as distinguished from those who may actually engage in the practice of dentistry; but a license to conduct an office does not carry with it the right to practice dentistry. They are separate and distinct, and the one does not include the other. If at any time the relator should fail to comply with the limitations of his license, he would violate the law and subject himself to the provided penalties.”

2. It is objected that this language is *dictum* and not necessary to a decision of the case. We do not so regard it. It was necessary and proper for this court to construe Chapter 120 of the Laws of 1919, and particularly pertinent for it to construe the proviso under which, if at all, the relator had authority to conduct a dental parlor. The opinion specifies the exact limitations under which the relator must conduct such business. In our view of the law there is no substantial distinction between “conducting” a

dental parlor and "maintaining" or managing one. To put the case plainly, the relator, under a license or privilege to "conduct, manage, or maintain a dental parlor," must confine himself strictly to those duties. He may maintain a dental office, have all the instruments and appliances for the extraction, filling, or treatment of teeth, and to manufacture false teeth, and employ competent dentists for that purpose, but can no more engage in the actual practice of dentistry, or in the examination of patients, or advise them in relation to their treatment, than if he had no license whatever. These things must be done by properly licensed employees, and if he even pulls or plugs a tooth, or advises as to its treatment, or manufactures or helps to manufacture false teeth for patients, he is a violator of the law against practicing dentistry without a license. We trust we have made ourselves sufficiently plain upon this point.

3. We see no constitutional objection to Chapter 120, Laws of 1919, and assume, without deciding, that a license issued to conduct a dental parlor is subject to revocation, the same as a license to practice medicine. The distinction between maintaining a dental parlor and engaging in the practice of dentistry seems to us plain. The person conducting a dental parlor furnishes the place and the appliances, by means of which persons actually licensed to practice dentistry can carry on that business; but unless such person, in addition to being licensed to conduct such parlor, is also licensed to practice dentistry, he cannot personally do a single act toward the relief of persons who resort to his parlors for treatment.

Both petitions are denied.

AFFIRMED. REHEARING DENIED.

BEAN, JOHNS and BENNETT, JJ., concur.

Argued at Pendleton May 4, affirmed June 15, 1920.

NAULT v. PALMER.

(190 Pac. 346.)

Judgment—Waters—Water Rights—Priorities—Binding on Parties to Litigation.

1. A decree fixing the rights and priorities of parties to a litigation over water rights did not affect other users of the waters of the river and its tributaries who were not parties to the suit, so that it was competent for the water board subsequently, on proper petition, to determine the rights and priorities of all users of the water system.

Waters—Water-master—Parties—Adjudication of Water Rights.

2. Where, under the present status of adjudication of certain water rights, the only dispute that can arise concerns the administration of a prior decree regulating priorities, the Supreme Court, plaintiff having voluntarily dismissed the suit as to the water-master, the official in charge of administration of the prior decree, can do nothing which would affect him.

Injunction—Officers—Enforcing Void Statute may be Restrained.

3. The general rule is that a court of equity is without jurisdiction to restrain by injunction the enforcement of criminal proceedings, the exception being that, where public officers are undertaking to enforce a void statute, injunction will lie against them, though not against the state.

[As to power of equity to enjoin criminal prosecution, see notes in 1 Ann. Cas. 121; 19 Ann. Cas. 459; Ann. Cas. 1916C, 1153.]

Waters—Right to Use—Cannot Benefit Junior User—Injury to Intermediate User.

4. One having priority in the use of water is entitled to use it so that its highest duty will be effected, and can employ it to the best advantage of the tract to which it is appurtenant, but cannot postpone the use of water at its best on such tract in favor of a separate parcel junior to another which is junior to the first, and, having used it on the tract junior to all, take it up and give a belated use on the first tract to the injury of the intermediate user.

Waters—Water-master—Priorities and Privileges must be Preserved.

5. It is the duty of a water-master, under Sections 6617, 6618, L. O. L., to preserve the priorities and the quantities of irrigation water consistently with the highest duty of water as applied to all concerned.

Waters—Courts—Authority—Rule of Evidence—Penalties.

6. The Circuit Court, in suit concerning water rights and priorities in certain streams, was without authority to establish an

arbitrary rule of evidence or to prescribe penalties for future violations of priorities by declaring a voluntary diversion to a tract to which the water was not appurtenant would be conclusive evidence it was not needed by a prior appropriator for fifteen days.

Appeal and Error—No Appeal from Circuit Court to Circuit Court.

7. There can be no appeal from the Circuit Court to the Circuit Court, especially to the same Circuit Court.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

Narrating that he is the owner of certain lands in Baker County, which we shall call the Nault place, and that the defendants Palmer and Denham are the owners of another tract designated as the McCulloch place, the plaintiff says in his complaint that in a suit between Palmer and Denham as plaintiffs and himself and others as defendants in the Circuit Court for Baker County, brought for the purpose of determining the priorities among the users and appropriators of the waters of Sutton Creek and its confluent, Ebell Creek, on March 28, 1912, a decree was duly rendered giving to Palmer and Denham the first right, amounting to 100 inches of water, to be used upon the McCulloch place, which right dated from an appropriation in 1872 and 1873, and a second permit for use to the Nault place, and another called the Richardson and Gilliam place, in the proportion of 35 inches to Nault and 65 inches to Richardson and Gilliam, but otherwise equal in right and time as between the last two farms. The complaint recited the full decree in detail, unnecessary to repeat; but it is sufficient to say that it confined the appropriation to each tract to that particular plot, and prescribed as to each one in effect that if the appropriation to any tract should be diverted to another at a time when adverse appropria-

tions were not satisfied, it should be conclusive evidence that the water so diverted was not required on the premises to which it was applicable for fifteen days thereafter, and during that time should become a part of the water subject to the other priorities as adjudicated in the decree.

It seems from the pleadings and evidence that the Nault holding is highest up the stream system in question and the McCulloch farm is lowest, and between them there intervenes what is called the Gossett place, now owned by Palmer and Denham, the water right appurtenant to which is junior to that of Nault. The complaint charges that Palmer and Denham plowed up the ditches originally constructed and in use at the time of that decree, whereby water was conveyed to the McCulloch place, and changed the point of their diversion so as to make the water available for irrigating not only the McCulloch place, but also the Gossett place, and says, in substance, that they postponed the irrigation of the McCulloch place, although it needed water, used the water on the Gossett place and afterwards availed themselves of their priority over Nault and irrigated the McCulloch place to the exclusion of his right, to his great damage. The plaintiff avers that, inasmuch as they had diverted the water from the McCulloch ranch to the Gossett place when his appropriation was not satisfied, he assumed, as he had a right to do, that this was a violation of the decree and conclusive evidence of that fact, giving him the right to use the water for fifteen days, and hence he opened his gates and was irrigating his place when the defendants caused his arrest in pursuance of a conspiracy between Palmer and Denham as appropriators and McKinney as water-master to deprive him of the use of the water.

He also says that immediately upon his arrest by McKinney, as water-master, the defendants, against his consent and over his protest, closed his head-gates and prevented him from using the water, and that it is their intention to cause his arrest whenever he attempts to irrigate his land. He prays for damages, that the defendants be prohibited from using their appropriation for any other than the McCulloch place, that they be restrained from increasing the irrigable area of land upon that farm, that the arrest of the plaintiff be enjoined, and for other general relief.

The defendants deny the whole complaint, except the ownership of Palmer and Denham in the land, water, and water rights described therein. They reiterate that ownership and aver that upon a petition filed by the water users of Powder River and its affluents, among which are Sutton Creek and Ebell Creek, the state water board surveyed the river and its tributaries, ascertained the rights of the users of those waters, and found and determined the rights of the plaintiff and others, among them Palmer and Denham, incorporating the same in its findings, which in due time were reported to the Circuit Court, which rendered a decree accordingly on May 18, 1918. The answer says that Nault participated in that proceeding, was notified of the time and place of the filing of the findings and order of determination, and was given opportunity to enter objections to the same, but that no objections whatever were filed; that the decree of the Circuit Court upon the board's findings has not been appealed from; that prior to the times mentioned in the complaint the water board had appointed the defendant McKinney water-master for the district in which the

premises here involved are situated; and that in his endeavor to distribute the water in conformity with the decree McKinney was compelled to arrest the plaintiff for interfering with the waters and the distribution thereof according to the decree. Palmer and Denham claim that the plaintiff's diversion of the water damages them by depriving them of its use for irrigating their growing crops, and that by reason of his ignoring the decree they have incurred loss of time and expenditure of money, to their further damage. They pray that his suit be dismissed, and that Palmer and Denham have judgment against him for costs and disbursements.

The reply admits all the answer up to and including the decree of the Circuit Court on the findings of the water board, but denies all other allegations of that pleading. The plaintiff further alleges in his final pleading that the decree in the original suit was made long prior to any determination by the board of relative rights in the water; that all the parties presented their claim based upon that decree; and that nothing was intended in that proceeding to supersede the former adjudication. At the beginning of the hearing of this suit the plaintiff dismissed the same as to the defendant McKinney, the water-master. After testimony had been taken and argument had, the Circuit Court entered a decree dismissing the suit, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. A. A. Smith* and *Messrs. Smith & Smith*, with oral arguments by *Mr. A. A. Smith* and *Mr. William Smith*.

For respondents there was a brief over the names of *Messrs. McColloch & McColloch*, and *Mr. W. H. Strayer*, with an oral argument by *Messrs. McColloch & McColloch*.

BURNETT, J.—1. From the record it appears that the rights and priorities of the parties were fixed and determined in the original decree. This, however, could not effect other users of the waters of Powder River and its tributaries who did not participate in that suit. The decree was binding only upon the parties to it. It was competent, therefore, for the water board on proper petition, as is admitted, to examine and determine the rights and priorities of all users of that water system, including the creeks mentioned. The water rights and priorities of the immediate parties to this suit were preserved, not impaired, but declared, by the ensuing decree of the Circuit Court. From that point on it became a question of the administration of those rights. We cannot give to either of the users of the water any right separate or different from that which the decree has declared. Nothing is gained by piling decree upon decree.

So far as the users themselves are concerned, one means for the enforcement of the decree is found in the provisions of Section 414, L. O. L., reading thus:

“A decree requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party do not comply therewith, be deemed and taken to be equivalent thereto. The court or judge thereof may enforce an order or decree in a suit, other than for the payment of money, by punishing the party refusing or neglecting to comply therewith, as for a contempt.”

Another method of executing the terms of the decree is through the operations of the water-master as hereinafter noted. The part of the water code embodied in Chapter VI of Title xliii, L. O. L., treating of the administration of water rights, provides substantially that the water board shall cause a survey of a stream system to be made upon the petition of individuals interested, and that, after giving a proper notice and hearing all parties concerned, it shall make a report to the Circuit Court, setting forth the rights and priorities of all users of water involved. Notice of the filing of such report is provided for and opportunity is given to be heard in support of or objection to the report, with the final result of a decree rendered upon the report, either affirming or modifying the same; and that decree is a determination of the rights and priorities of all parties to the proceedings the same as any other adjudication of that tribunal. For the administration of the rights thus perpetuated, a water-master is provided, whose duty it is to see that the water is used in accordance with the court's determination. His duties are summed up in Sections 6617 and 6618, L. O. L., as they stood at the times narrated in the pleadings herein. They are here set down:

“Sec. 6617. It shall be the duty of the said water-masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from said streams of his district. The water-master shall have authority to regulate the distribution of

water among the various users under any partnership ditch or reservoir, where rights have been determined in accordance with existing decrees. Whenever, in the pursuance of his duties, the water-master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the division superintendent or any water-master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

“Sec. 6618. Said water-master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water-master, shall have the right to appeal to the Circuit Court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water-master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water.”

2. It is true enough that under the latter section injunction will lie against the water-master if he fails to carry into effect the decree of the court in determining existing rights to the use of the water. It is true also that the adverse owners of water rights would be proper parties to such a suit as far as their rights were involved. But the essential party to such proceeding for injunction would be

the water-master. Conceding, without deciding, that the pleadings here show malfeasance by that officer, yet, as the plaintiff has voluntarily dismissed the suit as to him, no relief can be awarded against him in this litigation. As stated, the rights of Palmer and Denham and of the plaintiff have been adjudicated by the decrees already rendered, beyond our power of change. Under the present status of adjudication, the only dispute that can arise concerns the administration of the decree; and, not having before us the only official in charge of that administration, we cannot do anything which would affect him.

Complaint is made in a general way that the plaintiff has been arrested, and that the defendants propose to arrest him as often as he opens his head-gate. In *Hall v. Dunn*, 52 Or. 475 (97 Pac. 811, 25 L. R. A. (N. S.) 193), it is said:

“The rule is quite general that a court of equity has no jurisdiction by injunction to restrain the enforcement of criminal proceedings.”

3. The exception to that rule is also pointed out in the same case, and can be stated generally to be that, where public officers are undertaking to enforce a void statute, injunction will lie, not against the state, but against them, because they do not in fact represent the state, for it has not sanctioned any such proceeding; the supposed statute being void and constituting no genuine utterance of the law-making power: See, also, *Denton v. McDonald*, 104 Tex. 206 (135 S. W. 1148, 34 L. R. A. (N. S.) 453). Here no attack is made upon the validity of the legislation under which the water-master is proceeding. The regularity of the decree which he is supposed to enforce is confessed. It is plain, therefore, that the case made by the plaintiff is not within the

exception to the general rule that equity will not undertake to control criminal proceedings. The guilt or innocence of a criminal charge can be successfully established by the ordinary course of the law.

4, 5. Anyone having priority in the use of water is entitled so to use it that its highest duty will be effected. He can employ it to the best advantage of the tract to which it is appurtenant. He cannot be compelled to use it in advance of such a situation. On the other hand, he cannot postpone the use of water at its best upon that tract in favor of a separate parcel junior to another which in turn is junior to the first tract, and then, after having used it on the tract junior to all, take it up and give belated use on the first tract, to the injury of the intermediate user. This would be a perversion of the order of priority, constituting a legal waste; in other words, it would be wasting the senior appropriation as against the immediate junior and in favor of one junior to all others. It is the duty of the water-master under the statute to preserve the priorities and the quantities consistently with the highest duty of water, as applied to all concerned.

6. Great stress is laid by the plaintiff on the provisions of the original decree declaring that the voluntary diversion of water to a tract to which it was not appurtenant would be conclusive evidence that the water was not needed by the prior appropriator for fifteen days thereafter, and it is upon this assumed state of facts that the plaintiff predicates his right to open his headgate. So far as that is concerned, the Circuit Court in the original suit was called upon to determine the rights and priorities of the parties respecting the streams there involved.

It had no authority to establish an arbitrary rule of evidence or to prescribe penalties for future violation of priorities. Those matters were not pertinent to or included in the issues in that case.

7. The only questions that arise on the record as here disclosed are those of administration of the previous decree. The administrator, namely, the water-master, is not before us. As to the parties who remain in court, we cannot make any adjudication additional to or different from those already rendered by a court confessedly having jurisdiction of the parties and of the subject matter. The same was true of the Circuit Court as to this suit, for there can be no appeal from the Circuit Court to the Circuit Court, and especially to the same Circuit Court.

Under the circumstances, the trial court was right in dismissing the suit, and its order will be affirmed, without prejudice to the rights of any party to operate by injunction or other proper procedure against the water-master or any party to the decree as to the administration thereof. Neither party will recover costs or disbursements from the other here or in the Circuit Court.

AFFIRMED.

Justice JOHNS was present at the hearing but did not participate in the decision of this case.

Submitted on briefs May 3, affirmed June 15, 1920.

BROWN v. McCLOUD.

(190 Pac. 578.)

Animals—Damages for Trespassing by Sheep.

1. Evidence held sufficient to support a finding that land depastured by sheep was damaged to the extent of \$250.

Damages—Trespass—Evidence—Question for Jury as to Amount of Damages.

2. Where defendant's sheep, and those of other parties, trespass upon plaintiff's land, and damage it by eating the grass and bedding upon it, the approved practice is to leave the question as to the amount of the damage done by defendant's sheep to the good sense of the jury as reasonable men to form from the evidence the best estimate that can be made under the circumstances.

Damages—Witnesses—Approximate Estimates.

3. It is not a sufficient reason for disallowing damages claimed that they cannot be exactly calculated, it being sufficient that from approximate estimates of witnesses a satisfactory conclusion can be reached.

Animals—Trespass—Unfenced Lands.

4. That lands were unfenced and stock could roam thereon at will did not authorize defendant to herd or drive his sheep upon the land nor permit them to graze thereon.

Trial—Damages—Exemplary Damages—Instructions.

5. An instruction, "there is only one kind of damages which you may find in this case, that is compensatory damages; no exemplary damages are asked, and therefore you may only allow compensatory damages, if any at all"—was not erroneous as implying that, if exemplary damages had been asked by plaintiff, it would have been the duty of the jury to allow them.

Costs—Double Mileage—Witnesses—Statutes.

6. Court did not err in allowing double mileage and per diem fees to a witness for plaintiff under Section 818, L. O. L., although there was no showing that the witness was actually paid double fees.

Witnesses—Double Mileage—May Demand Fees in Advance.

7. A witness entitled to double fees under Section 818, L. O. L., may demand his fees in advance, but, in order to collect the same, he is not required to do so.

From Harney: DALTON BIGGS, Judge.

In Banc.

This is an action for damages on account of trespass by defendant's sheep. For about thirty years plaintiff has been engaged in the sheep business in Harney County, Oregon, and is the owner of 560 acres of unfenced pasture land situated about 75 miles south of Burns, Harney County, in what is known as the "Steen's Mountain Country." The complaint is in the usual form. The answer consists of a denial of the averments of the complaint, except as to the ownership of the land.

The testimony indicated that in 1917, there was growing upon the plaintiff's lands a good crop of natural wild grasses, which the plaintiff was reserving for use as fall range for his sheep. The defendant is likewise engaged in the sheep business and during the summer of 1917 was running a band of approximately 2,900 sheep. He leased 40 acres of land near that of plaintiff, and ran the sheep on the public range in the vicinity of plaintiff's land. Between August 5th and September 10th of that year defendant, without the consent of plaintiff, grazed his band of sheep on plaintiff's land, resulting in the eating off of the grasses growing thereon and denuding the pasture, and rendering the same worthless for that year. Plaintiff was away from the lands during the time. Upon returning to them about September, and ascertaining the condition, he demanded payment of defendant and instituted this action for \$500 damages. Upon trial of the case before a jury a verdict for plaintiff was rendered in the sum of \$250. From the consequent judgment defendant appeals.

AFFIRMED.

For appellant there was brief submitted over the names of *Mr. William H. Brooks* and *Mr. P. J. Gallagher*.

For respondent there was a brief prepared and submitted by *Mr. M. A. Biggs*.

BEAN, J.—1. It is contended by defendant that plaintiff did not show what, if any, damage was done to his land by defendant's sheep. This contention is not supported by the record. The plaintiff, testifying in his own behalf, stated in regard to this point that in the latter part of September, 1917, the grass was all eaten off the land; that the sheep had bedded there; and that he placed the reasonable market value of the growing grass on the land for that year at \$500 or \$600.

John Mason, a witness for plaintiff, testified that he tended camp for one B. B. Clark, a sheepman who was running sheep on the range; that he counted the defendant's sheep; that in going back and forth for supplies between October 5, and September 15, 1917, he saw defendant's sheep grazing on plaintiff's land four different times, saw the bedding place of the sheep there several times, and the herder's bed on the land twice. When he first saw the defendant's band of sheep on the land the grass was "pretty good." After the sheep had grazed thereon "the grass was all gone."

Claud Smyth, a witness for plaintiff, testified, in effect, that during the season of 1917 defendant had a band of about 3,000 wethers ranging in the neighborhood of plaintiff's lands; that in the latter part of August he saw them three or four hundred yards from plaintiff's lands; that there were fresh tracks all over the lands; and that he did not see nor know

of any other sheep in that neighborhood at the time. He also testified that he had known the land in question all his life, and placed the reasonable market value of the grass growing thereon at \$1 per acre; that in the latter part of August or the 1st of September he saw the lands, and "there was no grass there." Other witnesses testified to the same effect in regard to the market value of the grass on the land for that season.

It was the defendant's claim and he introduced testimony tending to show, that plaintiff's land had not been depastured by defendant's sheep. The testimony on behalf of plaintiff sustained the complaint. It was as definite as to the amount of damages as it could well be in a case of this kind.

2. It was in evidence that other stock trespassed upon plaintiff's land during that season. Defendant complains that the court submitted to the jury the question of how much damage, if any, plaintiff was entitled to recover from defendant. Where the injury occasioned by the tortious act of a defendant is indistinguishable from that arising from a like act of others, the approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances: *Jenkins v. Penn. R. Co.*, 67 N. J. Law, 331 (51 Atl. 704, 57 L. R. A. 309); *Ogden v. Lucas*, 48 Ill. 492.

3. It is not a sufficient reason for disallowing damages claimed that they cannot be exactly calculated. It is sufficient if, from proximate estimates of witnesses, a satisfactory conclusion can be reached: 17 C. J., § 91, p. 761. There was no error in the trial court thus submitting the question for determination.

4, 5. Defendant criticises instruction No. 2, which is to the effect that, if the jury found "that the defendant entered the premises of the plaintiff, that would constitute a trespass, unless it was with the consent of the plaintiff." It is claimed that the land was situated where sheep were "accustomed to cross at will," and that the charge did not cover the law. At one time this was a much-mooted question in the range country. The lands were unfenced, and stock could roam thereon at will; but this fact did not authorize the defendant to herd or drive his sheep upon the plaintiff's land nor permit them to graze thereon. This has been the rule in this state since the rendition of the opinion in the case of *French v. Cresswell*, 13 Or. 418 (11 Pac. 62, 17 Am. Neg. Cas. 217). This case was cited and followed in the cases of *Bileu v. Paisley*, 18 Or. 47, 51 (21 Pac. 934, 4 L. R. A. 840); *Strickland v. Geide*, 31 Or. 373 (49 Pac. 982); and *Pacific Livestock Co. v. Murray*, 45 Or. 103, 107 (76 Pac. 1079). As we read the record, the same question is raised in the present case in a different form. Error is predicated upon instruction No. 6, which is as follows:

"There is only one kind of damages which you may find in this case; that is compensatory damages. No exemplary damages are asked, and therefore you may only allow compensatory damages, if any at all; and by compensatory damages is meant damages in such an amount as will pay the plaintiff for the injury, if any, done by the defendant's sheep."

We think this instruction is fair and within the law. Defendant suggests that the charge implies that if exemplary damages had been asked by plaintiff it would have been their duty to allow them. We cannot give the language such meaning. The in-

struction is favorable to the defendant in limiting the amount that might be found by the jury. The learned counsel for defendant did not present the law set forth in this part of the charge in language more acceptable to the defendant or request any more specific instruction. We find no error in the charge submitting the cause to the jury.

6, 7. Error is assigned in the allowance of double mileage and *per diem* fees to Sid Skinner, a witness for plaintiff. This witness resided and was served outside of Harney County and more than 20 miles from the place of trial, and was compelled to attend as a witness upon the trial pursuant to Section 818, L. O. L., and was entitled to double fees: *Burrows v. Balfour*, 39 Or. 488 (65 Pac. 1062). The objection made is that it is not shown that the witness was actually paid double fees. A witness may demand his fees in advance, but in order to collect the same he is not required to do so. The same rule would apply to double fees as to single.

Believing that the case was fairly tried, and finding no reversible error in the record, the judgment of the lower court is affirmed. **AFFIRMED.**

Argued December 17, 1919, modified February 3, rehearing denied June 22, 1920.

SLATTERY v. GROSS.

(187 Pac. 300; 190 Pac. 577.)

Vendor and Purchaser—Joint Purchasers—Presumption.

1. The fair presumption is, in the absence of contrary evidence, that, where three parties agree to purchase real property at a given price, each one is to take an undivided one third in the real property and to pay one third of the price.

Specific Performance—Either Party to Contract for Purchase Entitled to Remedy.

2. Either party to a contract for the purchase of real property may maintain a suit for specific performance; the vendee to recover the land, and the vendor to recover the purchase price.

Specific Performance—One of Three Joint Purchasers Entitled to Remedy Against Joint Purchasers.

3. Where one of three vendees who have contracted to purchase property at certain price, and have agreed among themselves that each is to pay one third and receive a one-third undivided interest, has fulfilled his contract and paid his part of the purchase price, and is about to lose his interest in the land by reason of the failure of the other vendees to perform, he may maintain specific performance against them to compel them to carry out their contract, and thereby secure to himself the land to which he is entitled.

Specific Performance—Contract of Purchase—Option—Forfeiture—Vendee's Default.

4. A provision in a contract for the sale of land that on 60 days' default the contract should be void and payments thereon forfeited, or that the vendor might elect to declare the whole of the purchase price due and proceed at once by foreclosure or otherwise, held to give the vendor an option, after the 60-day period, even though he did not at once, to elect to proceed with the contract and enforce performance thereof.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

This four cornered and very complicated suit arose over a real estate transaction in the City of Eugene. By this transaction one Matlock and the defendants, Gross and McCallum, contracted to purchase from the defendants, Nancy J. Shelley and J. M. Shelley, a certain lot in said city for the sum of \$10,750. Of this sum \$3,500 was paid down, the three purchasers each contributing one third of the payment. Afterwards several payments of interest were made, which were also contributed upon the basis of each paying the interest on the amount remaining unpaid, as his own third of the purchase.

Matlock, at different times, paid his part of the interest, and also made payment on the principal

until he had finally paid his entire one third of the purchase price. The defendants, Gross and McCallum, however, never made any further payments after the first one, upon the principal. They continued to pay the interest up to about March 29, 1915. Ever since they have been in default in the payment of the interest also.

After paying up his one third in full, as hereinbefore stated, Matlock transferred his interest in the contract to the plaintiff. He afterwards died and his executrix is made one of the parties defendant herein.

The plaintiff, being unable to obtain title to her one third interest in the land to be conveyed under the contract, brings this suit against the defendants, Gross and McCallum, and makes the defendants, Shelleys and Matlock, executrix, nominal parties defendant. Plaintiff prays for alternative relief and among other things for a decree of specific performance against the defendants, Gross and McCallum, and that they be decreed to pay up the amount due from them under the contract, so that she can receive her one-third interest in the real property for which Matlock paid before transferring his interest to her.

The defendants, Shelleys, appear in the cause and file a cross-bill, in which they protest their willingness to convey the property to the purchasers and bring into court the deed therefor, and they also ask for a decree of specific performance against the defendants, Gross and McCallum, and the executrix of Matlock's estate.

The court below dismissed the bill of the plaintiff, upon the ground that she had a complete and adequate remedy at law, but decreed specific perform-

ance in favor of the defendants, Nancy J. Shelley and J. M. Shelley, against Gross and McCallum upon the cross-bill of the former. The decree exonerates the defendant, Nellie T. Matlock, executrix of the Matlock estate, and also provides for the foreclosure and sale of the property covered by the contract, to satisfy the judgment against the defendants, Gross and McCallum.

From this decree the plaintiff appeals. The defendants, Gross and McCallum appeal from the portion of the decree providing for a specific performance in favor of the defendants, Nancy J. Shelley and J. M. Shelley, and from that portion decreeing a foreclosure of the property and a deficiency judgment against them personally for any balance remaining unpaid.

There was no appeal by the defendants, Nancy J. and J. M. Shelley, and no appeal in behalf of the Matlock estate.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery*.

For cross-appellants there was a brief over the names of *Mr. A. C. Shaw* and *Mr. Jesse G. Wells*, with an oral argument by *Mr. Shaw*.

For respondents there was a brief over the names of *Messrs Smith & Bryson*, *Mr. O. H. Foster* and *Mr. Lark Bilyeu*, with oral arguments by *Mr. E. R. Bryson* and *Mr. Foster*.

BENNETT, J.—1. We think the court below erred in dismissing plaintiff's bill in equity, upon the ground that she had adequate relief at law. The contract between Matlock and the defendants, Gross

and McCallum, was for the purchase of a certain specific tract of real property. We think the fair presumption is, in the absence of evidence to the contrary, that where three parties agree to purchase real property at a given price, each one is to take an undivided one third in the real property and each is to pay one third of the price. That natural inference is strengthened in this case by the conduct of the parties themselves, and by the fact that each one of them did pay one third of the first payment, and that their numerous payments of interest were made upon the same basis.

Their agreement with the vendors was:

“That the parties of the second part hereby agree and bind themselves and their legal representatives to pay or cause to be paid to the said parties of the first part, their heirs or assigns, the sum of \$10,750.00.”

There is small room for doubt but what the arrangement among themselves was that each one should pay one third of that sum. The plaintiff could not possibly obtain the title to the undivided one-third interest in the real property, for which she had contracted, unless Gross and McCallum complied with their agreement to pay their part of the purchase price.

2. It is well settled that either party to a contract for the purchase of real property, may maintain a suit for specific performance—the vendee to recover the land and the vendor to recover the purchase price. The reason why the vendee may maintain a suit in equity for specific performance against the vendor—as announced by all the courts—is that the damages which he could recover in an action at law, are inadequate recompense for the loss of the real

estate which he has contracted to purchase, and which may have—and is assumed to have—a peculiar value to the purchaser, which money damages will not replace.

In Pomeroy on Contracts, pages 10, 11 and 12, it is said:

“One landed estate, though of precisely the same market value as another, may be entirely different in every other circumstance that makes it an object of desire. The vendee in a land contract may recover back the purchase money which he has paid, and with the damages which he thus receives he may purchase another estate of equal market value, but then there may be numerous features and incidents connected with the former tract which induced him to purchase, which made it to him peculiarly desirable, but which were not taken into account in the estimate of his damages, and which cannot be found in any other land which he may buy with the money. It is evident that in this and similar cases there would be a failure of justice unless some other jurisdiction supplemented that of the common law, by compelling the defaulting party to do that which in conscience he is bound to do, namely, actually and specifically to perform his agreement. * *

“Where land, or any estate therein, is the subject matter of the agreement, the equitable jurisdiction is firmly established. Whenever a contract concerning real property is in its nature and incidents entirely unobjectionable—that is, when it possesses none of those features which, as we shall see, appeal to the discretion of the court—it is as much a matter of course for a court of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it. The reasons which have led the courts to hold that damages are an inadequate compensation for the breach of contracts concerning land have already been stated. Undoubtedly there are cases where the reasons have no actual application and force. Land is often, especially in this country, bought and held simply as

merchandise, for mere purposes of pecuniary profit, possessing no interest in the eyes of the purchaser and owner other than its market value. The jurisdiction, however, extends to these cases. The rule having been once established, is now universal. The actual motives and design of the purchaser are never inquired into, for it is assumed in every instance that damages are an inadequate relief for the breach of a land contract."

Now, if damages at law for the breach of the contract is no adequate compensation for the vendee, when the vendor has failed to convey as agreed, it must follow by the most perfect analogy that damages at law would be no adequate compensation for one of the vendees, for the loss of his interest in the land, where the loss is about to be caused by the failure of two of his associates to perform their part of the contract. In either case he loses the land by reason of the failure of some party to the contract to perform according to its conditions, and in one case the damages which he could recover at law will be just as inadequate as in the other.

3. It follows that where one of three vendees, who have contracted for a joint purpose, has fulfilled his contract and paid his part of the purchase price, and is about to lose his interest in the land by reason of the failure of the other vendees to perform, he may maintain specific performance against them to compel them to carry out their contract and thereby secure to him the land to which he is entitled. The damages which he might receive at law are not adequate compensation for the loss of his interest in the real estate.

In this case the plaintiff alleges, and the answer and offer of the vendors establish, that they are standing ready to convey the property in accordance

with the contract, as soon as the other vendees have performed their part. If the plaintiff has assumed the joint liability of Matlock to the vendors, upon the purchase price of this land, there is still another ground for sustaining this suit.

In 32 Cyc. 248, the doctrine is announced, that—

“After maturity of the debt, although the surety has not been troubled by the creditor, he has the right, before payment to go into a court of equity, at any time, to compel payment of the debt by the principal.”

In *Davis v. First Nat. Bank of Albany*, 86 Or. 474, 486 (168 Pac. 929), it is said:

“Under the peculiar circumstances shown in this case, and in equity and good conscience, plaintiffs have a right to demand that the other co-obligors be required to contribute their share in the liquidation of the loan, even before plaintiffs pay the debt or the property of plaintiffs is sacrificed therefor. At law the surety must pay the debt before he can have an action, but not so in equity.”

It is not necessary for us to inquire in this case, as to whether or not the plaintiff had taken over the contract under such circumstances as to amount to an assumption of the debt, or joint liability of Matlock to the vendors, since his right to go into equity upon the first ground stated is apparent. The defendants, Gross and McCallum, however, contend most strenuously that they were released from liability and the contract became absolutely null and void by reason of their failure to comply with its terms.

The contract contained the following provision:

“And it is agreed that if the said parties of the second part shall fail to make any of said payments at the time and in the manner above specified, or

within sixty days after any payment of principal or interest shall become due, or shall fail to pay any tax or assessment before same shall become delinquent, this agreement shall be henceforth void, all payments thereon forfeited, and possession of said premises shall be at once surrendered to first parties; or said first parties may elect to declare the whole of said purchase price due and proceed at once, by foreclosure or otherwise, to collect the same, together with his reasonable costs, charges and expenses, including attorney fees."

4. It is urged that under this provision the contract became null and void, as soon as there was any default for a period of 60 days, and the only option on the part of the vendor was to proceed at once to foreclose and collect the price. We think this is not a fair construction of the contract. When this provision is read, together with the preceding provision—

"That the said parties of the second part hereby agree to bind themselves, and their legal representatives, to pay, or cause to be paid, to the said parties of the first part, their heirs or assigns, the sum of \$10,750.00"—

it seems apparent that the intention was to give the vendor an option, and that upon failure for the period of 60 days, he might either forfeit the contract or he might elect to proceed with it, and if he chose he could proceed at once to collect the amount still due on the contract.

It is true that the vendor did not proceed at once, at the end of 60 days, but it is also apparent from the evidence that all the parties either tacitly or directly agreed to an extension of time. It would be a hard rule to say that the vendor lost his right to proceed on the contract by reason of his leniency. Or that one vendee lost his remedy against the other,

because the vendor did not proceed at once, and must therefore lose not only his right to the land he had contracted for, but also the money he had paid, in accordance with his own contract thereon.

It follows from what we have already said that both the plaintiff and the defendants, Nancy J. Shelley and J. M. Shelley, are entitled to a specific performance against the defendants, Gross and McCallum.

Owing to the conflict of interest and the complicated relations between the parties, there is a good deal of difficulty in drawing a decree which shall respect the relative rights and interests of each. We think, however, that it will protect everyone as near as may be, if the decree provides for a specific performance in favor of the plaintiff against each of the defendants, G. G. Gross and James S. McCallum, for their respective halves of the amount still due to the Shelleys, and gives them 60 days in which to pay said amount into court, as fixed by the original decree in the court below, and that upon compliance with said decree the deed brought into court by the Shelleys in favor of the said defendants, Gross and McCallum, and the plaintiff be turned over to the vendees; and that upon failure to pay the same, execution shall issue in favor of the plaintiff, against each of said defendants, for the respective half of the amount still due, which shall be a general execution against the individual property of each; the returns on the same to be paid into the court, and applied on the amount due to the defendants, Nancy J. Shelley and J. M. Shelley; and if either of said executions shall be returned in whole or in part unsatisfied, then said Nancy J. Shelley and J. M. Shelley shall have and recover and have execution against the property of both or either of said de-

fendants generally for the amount remaining unpaid, and if said execution shall still remain unsatisfied, then the vendors' lien of the said Nancy J. and J. M. Shelley, upon the property in controversy, shall be foreclosed and the property shall be sold to satisfy the amount remaining unpaid, and if said property shall bring more than enough to satisfy the claim of the Shelleys, the balance remaining over shall be applied as follows: (1) To the payment of the excess paid by Matlock over and above the amount paid by Gross and McCallum, and the balance, if any remaining shall be divided equally between plaintiff and said Gross and McCallum respectively.

As the Shelleys have not appealed from the judgment in favor of Nellie T. Matlock, executrix of the Matlock estate, decreeing that they were not entitled to specific performance against her, or from the decree in favor of her against said Shelleys for costs and disbursements, that part of the decree will not be disturbed here.

The plaintiff and the defendants, Nancy J. and J. M. Shelley, will each recover their costs and disbursements against Gross and McCallum.

MODIFIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Former opinion modified and rehearing denied June 22, 1920.

PETITION FOR REHEARING.

(190 Pac. 577.)

On petition for rehearing. MODIFIED AND REHEARING DENIED.

Mr. H. E. Slattery, for plaintiff-appellant.

Mr. A. C. Shaw and Mr. Jesse G. Wells, for defendants and cross-appellants.

BENNETT, J.—In this case there is a petition for rehearing on behalf of plaintiff, and another in behalf of defendants Gross and McCallum.

The plaintiff claims that she is still not fully protected by the decree outlined in the original opinion, and the defendants Gross and McCallum ask that the decree shall provide that execution issue in favor of the defendants, Nancy J. Shelley and J. M. Shelley, against the plaintiff, as well as McCallum and Gross, and also that it adjudicate the rights of these latter defendants among themselves.

It is claimed that the defendant McCallum has paid \$180.00 more than Gross and that this should be taken account of, and that the decree should also provide for a judgment over, in case one of these defendants shall prove insolvent, or one shall be compelled to pay more than his share.

Of course the plaintiff is entitled to recompense for any loss she may suffer by reason of the default of the defendants, and the decree in this case should provide for a judgment in her favor against each of the defendants, for one-sixth of the market value of the property in question, in case it is sold on foreclosure, as in the decree provided, less any sums which may have been otherwise realized by plaintiff on such one sixth interest. She would not be entitled to recover the excess paid by her, as that might be much more than the real value of the property. The decree will provide that the Circuit Court shall retain jurisdiction of the cause, to find the value of the property and the amount of plaintiff's claim remaining unsatisfied, if any, at the end

of a foreclosure proceeding, and to enter general judgments in favor of the plaintiff therefor in accordance with foregoing.

We think the pleadings and the record of the appeal are not in such shape that we can give the Shelley defendants a personal decree against the plaintiff, or against the Matlock estate, and in that regard the decree of the court below must stand. Neither do we think there are any issues made by the pleadings upon which we could try out the rights of Gross and McCallum, as between themselves. They make no separate appearance but join in one answer. There is no allegation that one has paid more than the other, and no allegation that either is insolvent, and no prayer for relief as between each other. The decree, however, should be without prejudice to the rights of either, as against the other, which may grow out of the transaction.

We think, however, that the previous opinion should be modified as to the distribution of any amount received from a foreclosure (if there shall be any) after satisfying the claim of Mr. and Mrs. Shelley, and the claim of the plaintiff, so that such surplus shall be divided between the defendants Gross and McCallum in proportion to the amounts which shall have been previously collected from each, rather than by equal division, as indicated in the original opinion, and that the court below shall retain jurisdiction to fix such amounts, if that shall be necessary. In all other respects the original opinion is adhered to. The petitions for rehearing are denied.

OPINION MODIFIED and REHEARING DENIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued April 14, remanded with directions May 18, rehearing denied June 22, 1920.

**PACIFIC LIVESTOCK CO. v. PORTLAND
LUMBER CO.**

**NOYES-HOLLAND LOGGING CO. v. PACIFIC
LIVESTOCK CO.**

(189 Pac. 893.)

**Estoppel—Ejectment Against Railroad Held not Barred by Acts of
Plaintiff's Predecessor in Interest.**

1. In ejectment by a land owner against a lumber company which had constructed a railroad over the premises under alleged authority from plaintiff's predecessor in interest in consideration of the transportation of certain logs, plaintiff was not estopped by such action of his predecessor in interest in the absence of evidence that the former owner had knowledge before the building of the road that it traversed the particular tract in question.

**Principal and Agent—Purchaser of Timber Held not Agent so as
to Bind Seller by Agreement for Construction of Logging
Road.**

2. Where plaintiff's predecessor in interest sold certain timber to a third party, who was empowered to remove it in any way he chose, a logging company could not contract with such third party after the construction of the road over the land so as to bind plaintiff's predecessor in interest; the third party not being an agent in such respect.

**Principal and Agent—One Deals With Alleged Agent at His Own
Risk.**

3. One who deals with another representing himself to be an agent of a third party sought to be bound deals at his peril.

**Reformation of Instruments—Evidence Held not to Show That
Contract Failed to Include Premises Involved in Ejectment.**

4. In ejectment based on construction of a logging railroad over plaintiff's land, wherein defendants contended that, by mutual mistake, the contract for construction of the road made between defendant and plaintiff's predecessor in interest failed to include the premises in question, evidence *held* insufficient to prove a mistake authorizing a reformation of the contract.

**Ejectment—Verdict for Plaintiff must be Directed When Ownership
in Fee Simple is Admitted.**

5. Where in ejectment a cause of action for the recovery of the possession of realty without damages is stated, and it is admitted by the pleadings that plaintiff was the owner in fee simple of the property, a verdict for plaintiff should have been directed, since such title includes the right to possession in the absence of a showing to the contrary by the pleadings, in view of Section 328,

L. O. L., providing that a defendant shall not be allowed to give in evidence any estate in himself or another in the property or any license or right to possession thereof unless the same be pleaded in his answer.

Appeal and Error—Nonappealing Party cannot Support Judgment by Claim of Error in Trial Court's Ruling.

6. In ejectment action judgment for defendants, erroneous because they failed to deny, or plead or prove a defense to, plaintiff's allegation of ownership in fee, could not, on appeal by plaintiff alone, be supported by defendants on the theory that the trial court erred in ruling that no estoppel against plaintiff could be proved.

Appeal and Error—Verdict as to Damages in Ejectment Suit Held Conclusive on Appeal.

7. Where, in an ejectment suit submitted to the jury on the question of damages, a general verdict in defendant's favor was returned, such a verdict was conclusive on the question of fact involved in the claim for damages, and cannot be disturbed on appeal.

From Columbia: JAMES A. EAKIN, Judge.

Department 1.

The Pacific Livestock and Lumber Company, a corporation, began an action in ejectment against the Portland Lumber Company and the Noyes-Holland Logging Company, also, corporations, to recover possession of certain real property. For convenience the plaintiff will be called the "Livestock Company," and the defendant Portland Lumber Company, the "Lumber Company." It is not necessary to give separate designation to the other defendant. After reciting the corporate character of the parties, the complaint avers:

"That during all the times herein mentioned the plaintiff and its predecessors in interest have been, and plaintiff now is, the owner in fee simple of the following described real estate situated in the county of Columbia, State of Oregon, to wit: Southwest quarter of the southwest quarter of section 3, township 7 north, range 3 west, Willamette Meridian."

Thus far the allegations of the complaint are admitted. That pleading concludes with this averment, which is traversed by the answer:

“That on or about the first day of January, 1916, the defendants wrongfully and without any right therefor whatever, entered upon the aforesaid real property of the plaintiff; that the plaintiff is the owner in fee simple of all of said real estate and is entitled to the immediate possession thereof; that the defendants ever since the first day of January, 1916, and now, wrongfully withhold possession of said real estate from the plaintiff.”

As a further and separate cause of action, the plaintiff states the artificial existence of the parties and its ownership of the realty as before, all of which was admitted. Further pleading, in the second cause of action the plaintiff alleges special damages in that the defendants constructed a railroad over and across the premises, and in doing so made cuts in the ground, built up grades, and deposited a great quantity of rock along the line, to be used as ballast, all to the damage of the plaintiff in the sum of \$2,000. This was denied by the answer.

The defendants in the ejectment action filed a cross-bill in equity, setting up an agreement between the Lumber Company and M. T. O'Connell, the Livestock Company's predecessor in interest in the land involved, whereby there was granted to the Lumber Company by O'Connell the right of constructing a logging railroad over certain other realty owned by O'Connell in Columbia County, the privilege to expire in five years if the Lumber Company had completed its logging operations, otherwise to be extended for five years. The cross-bill claims,

in substance, that by mutual mistake of the parties the 40-acre tract for which the ejectment was brought was omitted from the contract; that, in pursuance of the agreement as actually intended by all concerned, it went upon the land in question, conceiving it to be within the terms of the covenant, and constructed its road, one of the considerations being that O'Connell's timber should be hauled out to the Columbia River at a certain rate; and that it had performed the agreement according to the original understanding, and demanded an extension of the contract for an additional five years, which was refused. In a separate statement in the cross-bill this matter is averred as an estoppel against O'Connell and the ejectment plaintiff as his successor, urging that O'Connell stood by and saw the road constructed over the tract in question, without objecting, and had enjoyed the benefits of the agreement by having his timber transported, whereby he and his successor are concluded from denying the right of the equity plaintiffs to maintain the railroad. The cross-bill prayed for a reformation of the contract so as to include the realty described in the ejectment complaint, and that the action be enjoined. The answer to the cross-bill was the general issue.

The equity suit was tried first, resulting in a decree dismissing the cross-bill and allowing the ejectment action to proceed. The answer in ejectment was amended in some particulars, the cause was tried before a jury, and a general verdict was returned for the defendant. The Lumber Company and the Noyes-Holland Logging Company appeal from the decree dismissing the cross-bill. The Live-

stock Company appeals from the judgment rendered for the defendant in the ejectment action.

REMANDED WITH DIRECTIONS.

For Noyes-Holland Logging Co. and Portland Lumber Co., there was a brief over the names of *Mr. Hugh Montgomery* and *Messrs. Platt & Platt*, with an oral argument by *Mr. Montgomery*.

For Pacific Livestock and Lumber Co. and M. T. O'Connell, there was a brief and an oral argument by *Mr. H. M. Esterly*.

BURNETT, J.—Considering the proceeding in equity first, we find the substance of the testimony to be that the engineer of the Lumber Company at the instance of its officers went with its vice-president and manager upon the premises, surveyed out a road across the O'Connell property, and made a map thereof, which the vice-president, as manager of the Lumber Company, submitted to O'Connell, reaching a result by negotiation culminating in the execution of the contract already mentioned, which had attached to it a copy of the map mentioned. Upon it was delineated the line of road from the Columbia River across some of O'Connell's land, but not touching the 40 acres in question. The greater portion of the proposed road was indicated by two solid parallel lines between which the space was divided equally between cross-sections of black and white. The other portion of the line, known as main line No. 2, was indicated on the map by a dotted line; but neither by the terms of the contract itself nor by the portrayal of the line of the road on the map made part of the contract, did the line of road touch the premises in dispute.

1. It is stated in the cross-bill and urged in the testimony that it is the custom among civil engineers to use a dotted line to designate a tentative line of road which is subject to change of direction in actual construction. It is not alleged in the pleadings or revealed by the testimony that this alleged custom was in general observance, or that it was known to, O'Connell, or that it was of such general notoriety as to be presumed to be known to him. The testimony fails to disclose that O'Connell knew that the railroad was being constructed across the premises in dispute. The most that is shown is that after he had sold his timber in that region to the Livestock Company, in which concern he was the principal, if not the sole owner of stock, the timber on that and adjacent tracts originally belonging to O'Connell was hauled out over the line of road and deposited in a slough adjacent to the Columbia River. For all that appears in the testimony, so far as O'Connell or his successor in interest is concerned, the logs might have been dragged over a skid road by oxen or snaked out by donkey engines. No one can be estopped in such a case by what happens without his knowledge. The rule is thus stated in *Roberts v. Northern Pacific R. R. Co.*, 158 U. S. 1, 11 (39 L. Ed. 873, 15 Sup. Ct. Rep. 756, 758, see, also, Rose's U. S. Notes):

“So, too, it has been frequently held that if a land owner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as hav-

ing acquiesced therein, and be restricted to a suit for damages."

It is true that in the Roberts case the railroad company involved was one possessing the power of eminent domain, while in the case at bar the Lumber Company constructed the road as a private enterprise; but the principle common to both is that estoppel must be grounded on knowledge of the party to be estopped, respecting the acts of the other party which the former may not gainsay. In the instant case there is no evidence that the owner of the particular tract had knowledge until afterwards that the road had been built upon it, hence there can be no estoppel to challenge its being there.

2, 3. The plaintiffs in the cross-bill, count upon arrangements they made with one Stennick, who purchased the timber from O'Connell or his corporation and was empowered to go upon the premises and take off the timber in any way he chose. The plaintiffs in equity urge that Stennick was O'Connell's agent, but the testimony does not show this in any degree. He was merely a purchaser from O'Connell, privileged to go upon the ground and take away the timber, but he was not in any sense the agent with whom the equity plaintiffs could contract so as to bind O'Connell. The Lumber Company contends that when the Livestock Company bought the land from O'Connell the railroad was there in operation, which put the purchaser on inquiry and was notice to it of the former's rights. All that doctrine amounts to is that the purchaser will be charged with what could be ascertained by reasonable inquiry. In the present juncture, according to the record, search would have disclosed that the Lumber Company, without the knowledge of

O'Connell, had assumed to act with Stennick, who had no authority to bind O'Connell. By the well-settled rules of agency, one who deals with another representing himself to be an agent of a third party sought to be bound, deals at his peril. Yet this is what the Lumber Company did with Stennick.

4. Neither is the evidence sufficient to prove a mistake. The Lumber Company took the initiative by actual visitation upon the land, prepared its plat upon which was designated the line of road, submitted it to O'Connell and had a contract drawn up which complies precisely with that map. No knowledge is imputed to O'Connell of any other line upon which the road should be constructed. There was no mutuality of mistake whatever. Descanting upon the dotted line, indicating as the engineer says, a tentative road, he himself says in effect that this was a mental conception of his own, not communicated to O'Connell, and that he never saw the latter until after the road had been constructed. To be available in the reformation of a contract, the proof of mistake must be clear and satisfactory; and the error must be mutual. No such situation is disclosed by the testimony, and hence the Circuit Court was right in dismissing the cross-bill in equity.

The amended answer of the defendants in ejectment essayed to put in as a defense the matter counted upon in equity as an estoppel. The court refused to allow it to be proved. At the close of the testimony in the trial of the law action, the plaintiff there moved for a directed verdict in its favor according to the prayer of its complaint and that the jury be authorized to assess the damages. This motion was denied, and its refusal constitutes the sole objection on behalf of the ejectment plain-

tiff to the rulings of the court as disclosed by the bill of exceptions.

5. It will be observed that there are two causes of action stated in the complaint—one for the recovery of the possession of the realty, without damages; and the other is a claim for special damages for injury to the freehold. As to the first cause of action, the motion was well taken and should have been allowed, for it is admitted by the pleadings that the plaintiff is the owner in fee simple of the property. This title draws with it and includes the right to the possession of the land, unless something else is shown by the pleadings. It is said in Section 328, L. O. L.:

“The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer.”

6. As stated, the record shows that in the law action the trial court refused to allow any proof of matter tending to show estoppel, but left it to the jury to say whether the entry of the defendants upon the land was wrongful, holding, in effect, that the matter of estoppel had been determined adversely to the defendants in the litigation upon the cross-bill. Whether this ruling in the law action was erroneous or not is not necessary to be decided, for the defendants have not appealed from the judgment.

7. The case presented on the motion for a directed verdict as to the first cause of action, therefore, is this: The plaintiff is admitted to be the owner in fee simple of the property. No license or other adverse estate has been pleaded, and an estoppel against the ejectment plaintiff has not been proved. Consequently the court should have directed a verdict in

favor of the plaintiff for the possession of the land. The case was submitted to the jury on the question of damages, and a general verdict in favor of the defendants was returned. This is conclusive on the question of fact involved in the claim for damages, and it cannot be disturbed on this appeal. The conclusion of the whole matter is that the cause must be remanded to the Circuit Court, with directions there to enter a judgment for the plaintiff and against the defendants for the recovery of the possession of the land, but without damages.

REMANDED WITH DIRECTIONS.

REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ.,
concur.

Argued April 15, affirmed May 25, rehearing denied June 22, 1920.

WHETSTONE v. JENSEN.

(189 Pac. 983.)

Appeal and Error—Verdict on Conflicting Evidence not Disturbed.

1. Verdict based on conflicting evidence will not be disturbed on appeal.

Municipal Corporations—Negligence of Defendant in Automobile Collision for Jury.

2. In an action by owner of automobile for damages by reason of a collision with defendant's automobile at street intersection, negligence of defendant *held* for the jury.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 1.

This was an action begun in the Justice's Court in Lane County to recover the sum of \$57.55, damages, which it is alleged plaintiff sustained, by reason of

defendant having negligently driven his auto truck into plaintiff's automobile.

The defendant denied the allegation of negligence on his part, alleged negligence on the part of the driver of plaintiff's car, and counterclaimed for \$25 damages. The case was tried in the Justice's Court and resulted in a judgment against defendant, from which he appealed to the Circuit Court, where there was again a verdict and judgment against him for \$57.50, from which he appeals to this court.

AFFIRMED.

For appellant, there was a brief and an oral argument by *Mr. S. P. Ness*.

For respondent there was a brief and an oral argument by *Mr. Howard M. Brownell*.

McBRIDE, C. J.—The objection that the complaint does not state facts sufficient to constitute a cause of action is untenable. The facts are set forth even to the extent of prolixity, and, taking them as true, it necessarily follows that the accident was the sole result of defendant's negligent driving.

1. The testimony was conflicting, each party laying the blame of the collision upon the other, and, unless the admitted physical facts show it was impossible that the accident occurred by reason of defendant's negligence, the verdict must stand. Without going into detail, we think the testimony is not such as to indicate that it was impossible for the account given by plaintiff's witnesses of the facts of the occurrence to have been true. If true, it indicates that plaintiff's wife was driving his machine and had the right of way at the intersection of two streets, and that defendant, in attempting to pass her, negli-

gently ran against the machine driven by her. The testimony of Mrs. Whetstone was to the effect that, when she entered the intersection of the two streets and was making a turn to the right, defendant's car was behind her and that he overtook her and struck her car. That she was driving about 10 miles an hour. The testimony of J. F. Berger, who was riding with Mrs. Whetstone, is to the same effect, except that he estimated the speed of her car at from 12 to 15 miles an hour. The defendant testified that his car was going at a speed of 8 miles an hour.

2. It is argued by counsel for defendant that if plaintiff was ahead of defendant and driving at the rate of 10 miles an hour, and defendant was following at the rate of 8 miles an hour, his car could not have overtaken the car of plaintiff and, therefore, the physical facts render it impossible that defendant could have caused the accident. But the speed at which defendant was driving is not an admitted physical fact. It depends entirely upon his testimony. The condition of the cars after the accident, and the testimony of Mr. Laroton, a disinterested witness who saw the accident, indicate that Mrs. Whetstone did not drive her car against the defendant's truck; but that defendant drove his truck against her car, so the testimony of Mrs. Whetstone, Mr. Berger and Mr. Laroton, taken in connection with the physical condition of the cars and their situation at the time of the accident, tend quite strongly to contradict defendant's statement that he was driving only 8 miles an hour. This is not a case where all the physical facts are admitted or absolutely certain, and, therefore, the facts were for the jury, who had the advantage of a view of the locality where the accident took place.

No other question of law appearing in the record, the judgment is affirmed.

AFFIRMED. REHEARING DENIED.

HARRIS, BENSON and JOHNS, JJ., concur.

Submitted on briefs May 18, affirmed June 22, 1920.

McFARLAND v. HUENERS.

(190 Pac. 584.)

Appeal and Error—Notice of Appeal—Sufficiency.

1. Great liberality should be indulged in, in judging the sufficiency of notice of appeal.

Appeal and Error—Judgment—Discrepancy in Date Not Fatal to Notice of Appeal.

2. Mere discrepancy in the date of judgment, as recited in the notice of appeal, is not fatal, where the judgment is otherwise sufficiently identified by the transcript to inform the adverse party fairly as to the judgment really appealed from.

Appeal and Error—Judgment—Notice of Appeal—Sufficiency.

3. The only question in determining the sufficiency of notice of appeal is whether it appears from notice and transcript, including bill of exceptions and undertaking, that judgment brought up in transcript is really the one appealed from in the notice, and that respondent was fairly notified thereof.

Appeal and Error—Judgment—Misstating Date—Notice of Appeal Sufficient.

4. Notice of appeal *held* sufficient under Section 550, L. O. L., though it stated October 20th as the date of judgment, which was not formally entered by the clerk until the 25th, though, under Section 201 he should have entered it on the 20th.

Bills and Notes—Misrepresentation—Fraud—Contracts.

5. The buyer of land was liable on his note given for part of the price, despite his allegations that plaintiff seller and his associates induced the buyer to make a change in the contract by falsely representing the law to the effect that by the change his obligations and liabilities on the notes and mortgages executed by him would be no greater.

Evidence—Bills and Notes—Parol Agreement Limiting Liability.

6. A parol agreement at time of execution of a note that the payee will rely on the mortgage executed by the maker, and not

assert any personal liability against the maker, is invalid, and cannot be successfully asserted to vary terms of note.

Pleading—Amendment to Answer—Discretion of Court.

7. Allowance of amendment to the answer presenting an absolute new defense, if admissible at all, was within the sound discretion of the trial court.

Pleading—Refusal to Permit Amendment to Answer—Not Abuse of Discretion.

8. In action on note given for part of price of realty, refusal to permit defendant to amend his answer to present an absolutely new defense *held* not such an abuse of trial court's discretion as would justify interference by Supreme Court.

Bills and Notes—Assignment—Collateral Security—Recovery by Assignee.

9. An assignment of a note to plaintiff as collateral security is sufficient title to support recovery in his behalf.

Appeal and Error—Attorney and Client—Attorney's Fee—Included in Verdict.

10. In action on note given for part of the price of realty, agreement of parties in open court through their attorneys as to the matter of attorney's fees is binding on them, and defendant cannot complain on appeal because the fee which he agreed was reasonable was included in the directed verdict for plaintiff.

From Jackson: FRANK M. CALKINS, Judge.

In Banc.

This is an action at law brought by the respondent against the appellant and his wife, to recover upon a promissory note for the sum of \$3,600, and interest. The note was given as a part of the purchase price for a certain tract of land in Jackson County, purchased by the defendant, John H. Hueners, from one L. M. Lyon, who was the original payee of the note.

The deal for the land was originally made several months prior to the date of the note. According to the original transaction there was to be no note or mortgage, but the defendant made a payment in cash and took a bond for a deed, by which the land was to be transferred to him only upon the completion of

the payments agreed upon. This original transaction was in June, 1911, and in March, 1912, the arrangement in relation to the deal was changed by mutual consent, and the land was then actually deeded to the appellant. He made an additional payment on the purchase price, and there being still a balance of \$6,600 due thereon, he and his wife executed two separate promissory notes, each of which was secured by a separate mortgage on the land, the one for \$3,000 and the other being the note in question for \$3,600. The first note and mortgage for \$3,000 seems to have been given direct to the plaintiff, McFarland, at the request of Lyon. The note sued upon, and the mortgage to secure the same, was executed to Lyon and he afterwards transferred it (apparently as collateral security) also to McFarland.

The defendants filed an answer, putting in issue the transfer of the note from Lyon to the plaintiff, and then alleging as an affirmative defense the previous transaction, preceding the execution of the note, substantially as hereinbefore stated, and that the defendants were induced to consent to the change in the arrangement and the execution of the note in question, by a representation that they would "be under no other or greater obligation for the purchase price of the land than was represented in the original agreement," and that, relying thereon, they executed the note in question, and the mortgage to secure the same, as well as the note and mortgage given to McFarland to secure the payment of the first \$3,000. Defendants also allege that the representations were false and fraudulent, and made for the purpose of deceiving, and did deceive, the de-

fendants. A reply was filed, putting in issue the allegations of defendant's answer.

At the trial the plaintiff placed in evidence the note in question, with proof of its execution and transfer to the plaintiff, and then rested. The defendants then offered to prove the facts stated in the answer, to which there was an objection, substantially upon the ground that the answer presents no defense, and that the facts stated therein in relation to the previous transaction were immaterial. This objection being sustained, the defendants asked leave to amend, by adding to the answer an allegation that the plaintiff, at the time of the execution of the note, promised and agreed with the defendants that he would not ask for a personal judgment against them, but would look wholly to the property for the satisfaction of the notes and mortgages; and also, by adding a claim for damages in the sum of \$3,600, as a counterclaim. The amendment was denied, and the defendant having rested, the plaintiff moved for an instructed verdict, which was granted.

The defendant John H. Hueners served and filed a notice of appeal to this court, and there is a motion to dismiss the appeal upon the ground that the notice does not sufficiently describe the judgment in the case, and that Minnie Hueners, one of the defendants and the wife of the appellant, was not made a party to the appeal and was not served with notice of the appeal.

AFFIRMED.

For appellant there was a brief submitted over the name of *Mr. W. E. Crews*.

For respondent there was a brief prepared and submitted by *Mr. A. E. Reames*.

BENNETT, J.—The first question to be considered is the motion to dismiss the appeal. The notice of appeal is as follows:

“In the Circuit Court of the State of Oregon for
Jackson County.

“H. M. McFarland, Plaintiff,

v.

John H. Hueners et al., Defendant.

“To the Above-named Plaintiff, H. M. McFarland,
and to A. E. Reames and M. Purdin, His Attor-
neys:

“You and each of you will take notice that the above-named defendant, John H. Hueners, hereby appeals to the Supreme Court of the State of Oregon from the order and judgment made and entered in the above-entitled court and cause on the 20th day of October, 1917, in favor of the plaintiff, H. M. McFarland, and against the defendant John H. Hueners, and from the whole thereof, and particularly from the order of the court directing the jury in said cause to return a verdict in favor of the plaintiff, as prayed for in his complaint, and also from the order of the court in refusing to grant defendant's motion for a nonsuit at the conclusion of plaintiff's case, and from the action of this court denying defts. request to file an amended answer.

“Dated at Medford, Oregon, this 6th day of December, 1917.

“W. E. CREWS,

“Attorney for Defendant.

“Due service of the above Notice of Appeal is hereby admitted this 6th day of Dec., 1917.

“A. E. REAMES, by A. B. HINCK,

“Attorney for Plaintiff.”

As a matter of fact the judgment appears from the transcript to have been formally entered in court on the twenty-fifth day of October, instead of on the twentieth day of October, as described in the notice of appeal.

It is claimed by respondent that on account of this discrepancy in the date, and because it does not otherwise more fully describe the judgment, and does not specifically name the other defendant, Mrs. Hueners, in the title, that it was not sufficient to give this court jurisdiction of the appeal. The cases of *Neppach v. Jordan*, 13 Or. 246 (10 Pac. 341); *Crawford v. Wist*, 26 Or. 596 (39 Pac. 218); *Hamilton v. Butler*, 33 Or. 370 (54 Pac. 200); and *Keady v. United Ry. Co.*, 57 Or. 325 (100 Pac. 658, 108 Pac. 197), are cited to sustain that contention. Judged by the rule announced in some of these earlier cases, the notice of appeal in this case might not be sufficient; but we think the later cases in this court, under the later provisions of the statute, are more liberal. An appeal may now be taken by oral notice in open court, and, if not so taken, it may be by written notice, but the statute says:

“It shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party, or his attorney that an appeal is taken to the Supreme Court * * from the judgment, order, or decree, or some specified part thereof”; Section 550, L. O. L.

In *Raiha v. Coos Bay Coal & Fuel Co.*, 77 Or. 275 (143 Pac. 892), Mr. Justice MOORE, delivering the opinion of the court, said:

“Under the practice formerly prevailing in this court, a notice of appeal as indefinite as the one under consideration would probably be regarded as insufficient [citing cases relied upon by respondent herein]. The later decisions, however, are to the effect that if, from an inspection of the notice of appeal it can be determined by fair construction or reasonable intendment, and without resort to evidence *aliunde* the transcript, that the appeal is taken from the judgment or decree in a particular case, it

will be sufficient to confer jurisdiction of the cause. * * An oral notice of appeal, given when the judgment or decree is rendered, is now sufficient to secure a transfer of the cause. * * As consonant with this late enactment, the procedure that heretofore obtained, with respect to the manner of inaugurating an appeal, has been so modified as to avoid all technicalities, and a written notice is now held to be sufficient if it complies with the requirements of the statute hereinbefore quoted, and, if from an inspection thereof the adverse party could not have been misled as to the order, judgment or decree undertaken to be reviewed."

1. We think this a true rule, and that great liberality should be indulged in, in judging the sufficiency of the notice of appeal.

In *Robinson v. Phegley*, 93 Or. 299, 303 (177 Pac. 942), it is said:

"This court has always been adverse to dismissing appeals on account of mere technical defects in the notice, where it has been evident that no one could be misled by a slight defect or omission."

2. It is now well settled that the mere discrepancy in the date of a judgment, as recited in the notice of appeal, is not fatal, where the judgment is otherwise sufficiently identified by the transcript, to inform the adverse party fairly, as to the judgment really appealed from: *Moorhouse v. Donica*, 13 Or. 435 (11 Pac. 71); *Salem Traction Co. v. Anson*, 41 Or. 562 (67 Pac. 1015, 69 Pac. 675).

3. The only question, therefore, is as to whether or not it appears from the notice of appeal and the transcript, including the bill of exceptions and undertaking, that the judgment brought up in the transcript is really the one appealed from in the notice of appeal, and that the respondent was fairly notified thereof by such notice.

It is certified by the judge of the court below, and appears from the bill of exceptions, that while the judgment in this case was not formally entered until the 25th, the trial was had and the verdict actually directed on the twentieth day of October—the day stated as the date of the judgment in the notice of appeal.

Section 201 of the Code (L. O. L.) provides:

“When judgment is given in any of the cases mentioned in Sections 199 and 200, it shall be entered within the day it is given. When a trial has been had before the court without a jury, judgment shall be entered by the clerk in conformity with the findings within the day the findings are filed. If the trial be by jury, judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned.”

If the clerk had properly performed his duty the judgment would have been entered on the 20th, the same day the verdict was directed and filed, and the day stated in the notice of appeal. The appellant seems to have assumed that what “ought to have been done was done,” and that the judgment was actually given on the 20th, as it should have been. Through some oversight of the clerk, the formal entry seems to have been postponed until the 25th.

It also appears from the notice of appeal that the case in which the appeal is taken was one in which there was an instructed verdict in favor of the plaintiff, and it appears from the transcript that such a directed verdict was returned in the case brought up, and which verdict was returned, as we have seen, on the very day stated in the notice of appeal.

4. Under the facts so presented by the transcript, we cannot doubt that the judgment brought up on

he transcript is the one appealed from, and that the respondent was so fully informed by the notice.

There is no intimation that there was any other case pending at that time between McFarland and Hueners, and in the absence of any showing, we cannot assume that there was such another action pending, and that there was a trial and directed verdict in that other action, on the same day as in this cause.

The contention that the appellant's wife was an adverse party upon whom notice of appeal should have been served, presents a very close question, and the previous decisions of this court do not seem to be in complete accord. The following cases seem to support the contention that such a codefendant is an adverse party, upon whom the notice of appeal must be served: *Moody v. Miller*, 24 Or. 179 (33 Pac. 402); *Templeton v. Morrison*, 66 Or. 493 (131 Pac. 319, 135 Pac. 95); *D'Arcy v. Sanford*, 81 Or. 323 (159 Pac. 567).

The cases of *United States Nat. Bank v. Shefler*, 77 Or. 579 (143 Pac. 51, 152 Pac. 234), and *Davis v. First Nat. Bank of Albany*, 86 Or. 474 (161 Pac. 93, 168 Pac. 929), seem to hold directly to the contrary.

In this case the two defendants appeared jointly, and united in the same answer. They were both represented by the same attorney, and this attorney prepared and signed the notice of appeal in the cause. It is doubtful if the notice was sufficient, but in the state of the authorities we have concluded to dispose of the case upon the merits. So considering the case, we think the respondent must prevail.

5. The matter set up in the original answer did not amount to a defense. The claim that plaintiff and Lyon had induced the defendant to make the change in the contract by representation, that his liabilities and obligations would be no greater on

the notes and mortgages then executed by him than they would have been under the original arrangement, was at most a misrepresentation as to the law governing the transaction.

In 20 Cyc. 19, Section (b), the law is thus epitomized:

“It is presumed that the law is equally within the knowledge of all persons, and assertions of law, although false, such as misrepresentations as to the legal effect of a particular written instrument or obligation, are as a general rule, regarded as mere expressions of opinion, and cannot be made the basis of an action for deceit.”

And again in the same volume on page 54:

“In accordance with the principles above stated, a misrepresentation as to a matter of law made by a vendor as an inducement to the sale is regarded as an expression of opinion which ordinarily does not constitute actionable fraud.”

If there are any circumstances in which such fraudulent representations as to the law would constitute a good cause of action, or a good defense, they are not presented in this case.

6. The amendment offered by the defendant, in which he undertook to allege a positive agreement, at the time of the execution of the note, and as a part of that transaction, that plaintiff would rely upon the mortgage alone, and would not assert any personal liability against the maker of the note, would have been no defense unless it was in writing, for it is too well settled to justify the citation of authorities that such an agreement in parol is invalid, and cannot be successfully asserted to vary the terms of a written contract.

Here the agreement sought to be alleged was in the very face of the promissory note, by which the

defendant expressly agreed to make himself personally liable.

As we understand it, there was not at the time of the trial, and is not now, any contention that there was such an agreement as the one sought to be relied on, in *writing*; and if there had been such a contention, it should have been presented to the court upon the application to amend, as, in the absence of such writing, the amendment would be idle and useless. Besides, the amendment presents an absolutely new defense—a positive agreement against personal liability, which had not been at all alleged in the original answer.

7, 8. Assuming that such an amendment would have been admissible at all, at that stage of the proceeding, it was within the sound discretion of the court, and the record does not show such an abuse of discretion as would justify an interference by this court.

In *Pacific Co. v. Cronan*, 82 Or. 388, 392 (161 Pac. 692, 693), it is said by Mr. Justice McBRIDE:

“The allowance or refusal of an amendment is largely a matter of discretion of the court, and must depend upon the peculiar circumstances of each particular case; the general rule being that the ruling of the trial court upon the question will not be disturbed unless there is an abuse of discretion or an absolute disregard of some affirmative statute”:

See, also, *Sharkey v. Portland Gas Co.*, 74 Or. 327 (144 Pac. 1152).

9. As to the sufficiency of the proof of the assignment of the note, it is well settled that an assignment to the plaintiff as collateral security is sufficient title to support a recovery in his behalf.

“Ordinarily the pledgee of a chose in action may sue in his own name. It follows that where nego-

liable paper is transferred as collateral security, the holder may sue thereon in his own name, either as having the legal title or as being the real party in interest": 8 C. J. 844, § 1104.

See, also, Neg. Instrument Law, § 5870, L. O. L.

10. The matter of attorneys' fees seems to have been agreed upon by the parties through their attorneys in open court; and we think is binding upon them, and that the defendant is not in a position to complain because an attorney's fee, which he agreed in open court was reasonable and fair, was included in the directed verdict.

The judgment of the court below is affirmed.

AFFIRMED. REHEARING DENIED.

Argued March 24, affirmed April 20, rehearing denied June 29, 1920.

BEEDLE v. STONDALL LAND AND TIMBER CO.*

(189 Pac. 427.)

Corporations—Act Authorizing Service Through Corporation Commissioner Without Retroactive Effect.

1. Act authorizing service of summons on foreign corporation through corporation commissioner for state did not have retroactive effect, authorizing service on corporation which at time of passage of act and its taking effect had no organization or agent within state, and had retired from state and ceased to do business therein three years before; it being immaterial commissioner transmitted summons to home office of corporation.

Process—Service of Summons in One State Does not Give Courts of Other State Jurisdiction.

2. The courts of one state cannot get jurisdiction by service of summons in another state.

*For a discussion of the question of acquiring jurisdiction over foreign corporations when they remain out of the state, see note in 70 L. R. A. 530. REPORTER.

Appearance—Motion to Quash Summons not Answer on Merits Amounting to "General Appearance."

3. Motion of defendant foreign corporation to quash summons attempted to be served on it through corporation commissioner *held* not in nature of answer on merits to amount to "general appearance" and give court jurisdiction without regard to sufficiency of service.

From Washington: GEORGE R. BAGLEY, Judge.

Department 2.

In this case the defendant is a Wisconsin corporation, and the plaintiff brings this action to recover damages for the alleged breach of a contract by which the plaintiff was empowered to sell a large amount of timber for the defendant company, and for the sale of which he was to receive a commission of 5 per cent of the selling price. There was a motion to quash the summons in the court below, which was decided in favor of the defendant, and the decision upon this motion presents the only question upon the appeal.

The affidavits offered by the defendant, upon which the court based its decision quashing the summons, were undisputed and tended to show that it sold out all of its business in the State of Oregon, in the year 1914—three or four years before the commencement of this action—and removed from the state, and had not since said time transacted any business whatever in the state. About that time its agent in the state resigned and no other agent was appointed. On the sixteenth day of January, 1917, the authority of the company to do business was revoked by proclamation of the Governor of the state.

The service of summons upon the defendant was made upon the corporation commissioner for the State of Oregon, who forwarded the papers to the

defendant's office in the State of Wisconsin. It is claimed on behalf of the defendant that such a service was void, and on behalf of plaintiff that it was valid, and, in addition thereto, plaintiff contends that defendant's motion to quash the summons was in the nature of an answer and general appearance, and that it cannot, therefore, question the sufficiency of the summons.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Wm. H. Hallam*.

For respondent there was a brief over the names of *Mr. Guy C. H. Corliss* and *Messrs. Giltner & Sewall*, with oral arguments by *Mr. Corliss* and *Mr. Russell E. Sewall*.

BENNETT, J.—We do not think that the service of summons in this case was sufficient to give the court jurisdiction in a personal action of this kind. At the time of the execution of the contract, both the plaintiff and defendant were residents of the State of Wisconsin, and the contract was executed there. There is nothing to show that the contract was to be fulfilled in the State of Oregon, unless that can be assumed from the mere fact that the property to be sold was situated in this state.

There is a very evenly balanced conflict between the authorities as to whether such contract executed between residents in another state and entered into in another state, is a contract which can be enforced against a foreign corporation in the courts of this state, upon a constructive service, designated by such legislative acts as the one in question, even though the corporation is continuing to do business and to keep an agent within the state.

1. In this case, however, it is made to appear by undisputed affidavits filed by the defendant, that the defendant corporation had withdrawn from the state more than three years prior to the institution of the action, and that it had no property or business interests within the state thereafter, and before the commencement of this action, the authority of the company to do business in Oregon was revoked.

The act authorizing service in such a case as this, on the corporation commissioner, did not go into effect until May 19, 1917. At that time the defendant, as we have already seen, had long since withdrawn from the state, and was not transacting any business and had no interests within the state. Under this condition we think it entirely plain that the law could not have a retroactive effect, which would authorize such a service of summons upon a corporation which had, at the time of its passage, no organization or agent within the state, and which had been removed from the state and ceased to do business therein many years before.

2. The fact that the corporation commissioner transmitted the summons to the office of the defendant in Wisconsin, could not affect the matter or give the court any jurisdiction in the cause. Ever since the decision in *Pennoyer v. Neff*, 95 U. S. 714 (24 Ed. 565, see, also, Rose's U. S. Notes), it has been settled law that the court of one state could not get jurisdiction by service of its summons in another state.

In that case it was said by a court, whose decisions are binding and controlling upon all the courts in all the states upon such a question:

Process from the tribunals of one state cannot be carried into another state, and summon parties there

domiciled to leave its territory and respond to proceedings against them. * * Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.”

3. It is earnestly urged, however, on behalf of the plaintiff, that the motion of the defendant to quash the summons was in the nature of an answer on the merits, and therefore amounted to a general appearance, and gave the court jurisdiction without regard to the sufficiency of the service of summons.

The motion on behalf of defendant was as follows:

“Now comes the defendant above named, by its attorneys, specially and only for the purpose of this motion and not otherwise, and moves the court, on the affidavits of Russel E. Sewall and R. L. Sabin, filed herein and on the files of this cause as presented herewith, to vacate and set aside the attempted service of the summons on said defendant as unauthorized, illegal and void, for the following reasons, to wit:

“That heretofore and on January 16, 1917, the authority of said defendant to do business in the state of Oregon was revoked by proclamation of the Governor of Oregon, and that said corporation has not transacted any business of any kind in the state of Oregon since said last-named date; that said corporation had not, at the time of the filing of said complaint or at any time since, any property or place of business or resident agent or attorney or other representative in the state of Oregon upon whom service could be had.”

We think this paper could not be considered as an answer in any sense at all. It did not purport upon its face to be an answer, but a motion, and it had no characteristics of an answer.

An answer, under the Code, runs in the name of the defendant and puts in issue the allegations of

the complaint, or presents in orderly form an affirmative defense. It must be verified and ordinarily asks for relief which is decisive of the cause, for a dismissal or a judgment for the defendant. None of these were found in this paper.

“A special appearance, designating the particular purpose for which the party appears, limits the appearance to that particular matter”: *Kinkade v. Myers*, 17 Or. 470.

“A defendant may appear specially without submitting himself to the jurisdiction of the court”: *Winter v. Union Packing Co.*, 51 Or. 97 (93 Pac. 930).

“Where a defendant has appeared specially and moved to quash the service of summons, and that is the only relief he asks from the court, the fact that he assigns the insufficiency of the complaint as one of the grounds of his motion, does not make his appearance a general one and give the court jurisdiction over him”: *Whittier v. Woods*, 57 Or. 432 (112 Pac. 408).

The judgment of the court below should be affirmed. AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and HARRIS and JOHNS, JJ., concur.

Argued March 25, affirmed May 11, rehearing denied June 29, 1920.

HAMMOND LUMBER CO. v. PUBLIC SERVICE
COMMISSION.

(189 Pac. 639.)

Carriers—Rates are Subject to Control of Public Service Commission.

1. Under Laws of 1913, page 748, the right to fix rates for transportation primarily is lodged in the carrier, but subject, under Section 6906, L. O. L., to control and revision by the Public Service Commission either on its own motion or at the complaint of interested parties.

Carriers—Rates must be Reasonable.

2. Under Section 6887, L. O. L., the object to be obtained and the canon by which all the activities of the Public Service Commission are controlled is to establish a reasonable rate for services rendered or to be rendered by the carrier; unjust and unreasonable charges being prohibited.

Constitutional Law—Power to Compel Service and Reasonable Charges is Legislative.

3. The power to compel railroads to render adequate service and to charge reasonable rates for it is legislative in its nature and not judicial.

Carriers—Finding as to Reasonableness of Rates Contrary to Evidence Beyond Power of Commission.

4. A finding of the Public Service Commission as to the reasonableness of a railroad's rates made without evidence or against the evidence is arbitrary and beyond the power of the commission, and an order based thereon is contrary to law and subject to be set aside by a court of competent jurisdiction.

Carriers—Reasonableness of Rate Fixed by Public Service Commission is Only Justiciable Question in Suit to Set Order Aside.

5. In suit to set aside an order of the Public Service Commission establishing rates for a railroad, the reasonableness of the rate is the only justiciable question, and the court will not assume the place of the commission or set its order aside on its own conception of its wisdom.

Carriers—Railroad Serving Logging Territory Entitled to Rates Which Provide for Amortization of Value of Road.

6. Under Article I, Section 18, of the Constitution, a railroad which serves a logging territory and will be without value save as junk on exhaustion of timber resources is entitled to charge such rates as will not only give a reasonable return on the money invested, plus interest charges, but will also provide for amortization of the plant.

Carriers—Reasonable Interest on Investment Should be Allowed from Beginning.

7. In fixing rates for a railroad, a reasonable rate of interest on the investment in the property should be allowed from the beginning of the undertaking.

Carriers—Matter of Rates Continually Under Scrutiny of Commission.

8. Under Section 6906, L. O. L., the matter of a railroad's rates is continually under the scrutiny of the Public Service Commission in the exercise of a flexible, administrative authority, and can be reopened at any time, either on its own motion or the petition of interested parties.

From Marion: **GEORGE G. BINGHAM**, Judge.

Department 2.

The plaintiffs are owners of large tracts of timber in Columbia County in a region served by the Columbia & Nehalem River Railroad Company, which owns and operates a railroad about 27 miles in length in that county, mainly for the purpose of hauling logs to the Columbia River. The Railroad Company filed with the Public Service Commission of Oregon its schedule of freight rates, which was contested before the commission by the plaintiffs here, as to the rate to be charged on logs. After a hearing before the commission, in which the plaintiffs and the Railroad Company were both represented, the commission made an order fixing the rate on logs at certain figures. Dissatisfied with this order, the plaintiffs instituted this suit against the commission to set aside the rates fixed by it. The Circuit Court affirmed the order of the commission and the plaintiffs have appealed. AFFIRMED.

For appellants there was a brief over the names of *Mr. William C. McCulloch* and *Mr. Joseph N. Teal*, with an oral argument by *Mr. McCulloch*.

For respondent there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. J. O. Bailey*, Assistant Attorney General, and *Messrs. Veazie & Veazie*, with oral arguments by *Mr. J. C. Veazie* and *Mr. Bailey*.

BURNETT, J.—The authority for a suit of this nature is found in Section 6910, L. O. L., reading thus:

“Any railroad or other person, persons or corporation interested in or affected by any order of the commission fixing any rate or rates, fares, charges,

classifications, joint rate or rates, or any order fixing any regulations, practices or service, being dissatisfied therewith, may commence a suit in the Circuit Court of Marion County against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order, is unlawful, or that any such regulation, practice or service prescribed or fixed in such order is unreasonable, in which suit a copy of the complaint shall be served with the summons as in civil actions. The commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the Circuit Court shall always be deemed open for the trial thereof, and the same shall be tried and determined as a suit in equity. In all trials under this section, and Sections 6911, 6912 and 6913 hereof, the burden of proof [shall] be upon the plaintiff to show by clear and satisfactory evidence that the order of the commission complained of is unlawful, or unreasonable, as the case may be."

1-3. Primarily the right to fix the rate for transportation is lodged in the carrier (Chapter 361, Laws of 1913), but subject to control and revision by the Public Service Commission, either on its own motion or at the complaint of interested parties: Section 6906, L. O. L. The object to be attained, and the canon by which all the activities of the commission are controlled, is to establish a reasonable rate for services rendered or to be rendered by the carrier, every unjust and unreasonable charge being prohibited as unlawful: Section 6887, L. O. L. The power to compel railroads to render adequate service and to charge reasonable rates for such services is

legislative in its nature, and not judicial. It has been held in *State v. Corvallis & Eastern R. R. Co.*, 59 Or. 450 (117 Pac. 980), that the appointment of a commission to fix certain rates and practices as reasonable is not a delegation of legislative power; the principle being that, while a legislative assembly cannot delegate its powers to enact laws, it may direct the application of a statute to a specified state of facts which depend upon the existence of certain conditions to be determined in a particular manner. The ascertainment of the conditions governing the reasonableness of rates to be charged for transportation of people and property is confided to the commission and at least in an ancillary sense, this may be classed as a branch of the legislative power.

The Supreme Court of Wisconsin, from the enactments of which state our Public Service Commission statute is copied in large measure, speaking by Mr. Justice TIMLIN, in *Minneapolis etc. Ry. Co. v. Railroad Commission of Wisconsin*, 136 Wis. 146 (116 N. W. 905, 17 L. R. A. (N. S.) 821, uses this language:

“This law (Chapter 362, Laws of 1905), establishes, and thenceforth assumes, the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the railroad commission the duty to ascertain and disclose that particular rate, charge, classification, or service. The law intends that there is only one rate, charge, or service that is reasonable and just. When the order of the commission is set aside by the court, it is because this reasonable and just rate, charge, classification, or service has not yet been correctly ascertained. When the order of the commission has been rescinded or changed by the commission because of changed conditions, it is because there is a new reasonable rate to be ascertained and disclosed, applicable to

such new conditions and fixed by force of law immediately when the new conditions come into existence. But the theory and the mandate of the law is that this point always exists under any combination of conditions and is always discoverable, although not always discovered. Until it is discovered and made known, the former rates and service prevail. The order of the commission is *prima facie* evidence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force. If it were conceded that the commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power to the commission. But the theory of this law is to delegate to the commission the power to ascertain facts and to make mere administrative regulations.

“If this court or the Circuit Court were by the statute in question authorized to investigate the subject anew, to put itself in the place of the commission and search for this reasonable and just rate, with power to substitute its own judgment of what is reasonable and just for the judgment of the commissioners, the statute might be subject to grave criticism. But the courts are not by this statute so authorized. The authority given to the Circuit Court is not to search for or disclose or declare this ‘reasonable and just’ rate or service, but merely to determine whether the order of the commission is ‘unreasonable’—quite a different thing. We think the legislature was within its power in conferring upon the courts such authority to inquire whether or not the order of the commission was unreasonable and to vacate the order if so found. In doing so the courts are required to exercise no legislative power, to ascertain and disclose no rates, to declare no rule or no law unreasonable, but merely to exercise judicial power to ascertain and determine whether the commission has so far failed in its search for this lawful, just, and rea-

sonable rate as to have found instead, and declared, that which is unreasonable. The result of the reversal of the order of the commission is not to establish this fact or ascertain this point of reasonableness, but to leave it undisclosed, leaving the former rates to stand or requiring the commissioners to try over again to find it. In reviewing the order of the railroad commission the inquiry is not whether the rate, regulation, or service fixed by the commission is just and reasonable, but whether the order of the commission is unreasonable or unlawful. The nature of the inquiry is changed at this point, and the court is not investigating for the purpose of establishing a fixed point. Whether or not the order is within the field of reasonableness, or outside of its boundaries, is the question for the court. It is quite a different question from that which was before the commission in this respect. The order, being found by the court to be such that reasonable men might well differ with respect to its correctness, cannot be said to be unreasonable. From this aspect it is within the domain of reason, not outside of its boundaries. This is the viewpoint of the reviewing court. Doubtless the court may, for the purpose of comparison and to aid it in ascertaining how far the order diverges from a reasonable standard, take evidence of and consider such criterion. But this is only for comparison. The court cannot legally adjudicate or declare this statutory standard.

“Unless the plaintiff is able to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be, the order must stand. The words ‘clear and satisfactory evidence’ are significant, because at the time of the enactment of this statute they were used in the law of this state to describe a degree of proof greater than a preponderance of evidence and such as was necessary in order to establish fraud by that party to an action upon whom the burden of proof rested [citing authorities].”

4. A finding without evidence or against the evidence is arbitrary and beyond the power of the commission; and an order based thereon is contrary to law and subject to be set aside by a court of competent jurisdiction. "In a case like the present, the courts will not review the commission's conclusions of fact * * by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of the evidence is a question of law": *Interstate Commerce Commission v. Louisville etc. R. R. Co.*, 227 U. S. 88 (57 L. Ed. 431, 33 Sup. Ct. Rep. 185, see, also, Rose's U. S. Notes). In *Public Service Commission of Indiana v. Cleveland etc. Ry. Co.* (Ind.), 121 N. E. 116, it is held in a suit to set aside the findings of the commission that on appeal to the Supreme Court the decision of the trial court will be approved if there is any evidence to sustain it: See, also, *Hocking Valley Ry. Co. v. Public Utilities Commission of Ohio*, 92 Ohio St. 9, 362 (110 N. E. 521, 952, Ann. Cas. 1917B, 1154, L. R. A. 1918A, 267).

5. The reasonableness of the rate is the only justiciable question in contentions of this sort, and the court will not assume the place of the commission or set its order aside on the court's conception of its wisdom: *State v. Great Northern Ry. Co.*, 130 Minn. 57 (153 N. W. 247, Ann. Cas. 1917B, 1201); 135 Minn. 19 (159 N. W. 1089), was a case where the commission was called upon to require the defendant company to construct a new depot at Ada, a station on its lines. In speaking of the rules and orders made by the commission, the court said:

"The making of such regulations is a legislative or administrative, and not a judicial, function. The reasonableness of such an order is, however, a judicial question. The court may review the orders of

the commission, but only so far as to determine whether they are reasonable. The order may be vacated as unreasonable if it is contrary to some provision of the federal or state Constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment. * * The court does not consider the wisdom or expediency of the order. The court ascribes to the findings of the commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience,' and its conclusion, when supported by substantial evidence, is accepted as final."

"If the conclusion arrived at by the commission finds justification in the testimony, this court will not substitute its judgment for that of the commission": *Grand Rapids etc. Ry. Co. v. Michigan Railroad Commission*, 188 Mich. 108 (154 N. W. 15).

This is the manifest substance and effect of our own statute; for the suit is authorized, not to make new rates, but only to set aside those established by the order of the commission. In brief, the function of the court is, in a sense, to review the proceedings of the commission and to ascertain if it has violated any principle of law or gone beyond the scope of its duty in making the order. However much the judges hearing the case at any stage of the judicial proceedings might differ on the conclusion of the commission, as to its wisdom or as to its determination of any pure question of fact, the courts must respect the decision of the commission, if it has not departed from the scope of its authority established by the legislative power of the state.

6. The case was tried in the Circuit Court solely on the testimony taken before the commission. Neither the objectors, plaintiffs here, nor the Railroad Company, tendered any additional testimony. The principal grievance voiced by the plaintiffs is that the commission considered as one of the elements, in making up the rates which the Railroad Company was entitled to charge, the amortization of the reasonable value of the plant of the company, and as incidental to that reckoned the discount upon the bonds of the company, which it sold at 5 per cent less than par to obtain funds with which to build the road. It is contended by plaintiffs that all the shipper is required to pay is for carriage of its products, a sufficient amount to cover a reasonable rate of interest on the value of the plant employed in the carriage. For the defendant it is maintained that the company, as time goes on, is entitled to charge such a rate as will not only afford a fair return of interest on the value of the plant, but will provide for and absorb the depreciation of the property under all the circumstances of the particular case. The carrier devotes its private property to public service, but it is none the less on that account within the protection of the Constitution that such property shall not be taken for public use, nor the particular services of any man demanded, without just compensation: Oregon Const., Art. I, § 18. Thus to devote its property means that it gives to the public the right or option to demand its service or the use of its property, but this is always subject to the condition of just compensation. Neither the public nor any of its component parts is compelled to exercise this right or option, but if it is exercised, it can be only under the attendant constitutional condition. It is said that a shipper should

not be compelled to buy the company's railroad. But it is equally true in principle that the company is entitled to such rates as will fairly compensate it for the services rendered and for depreciation of its plant employed in such service, even though it reaches the vanishing point. In other words, the company ought to be allowed to come out even, in an undertaking which may reasonably be expected to exhaust itself, and besides quitting whole, to receive a fair compensation for its services. The carrier ought not to be compelled to sacrifice its plant and be content merely with compensation amounting only to interest on its value. To ignore this principle would be to violate the constitutional inhibition already quoted. A public service corporation cannot be expected to sacrifice its property for the public good. Nor is it bound to see its property gradually wasted by wear and decay without making provision for its replacement. It is entitled to earn enough not only to meet the expenses of current repairs, but also to provide means for replacing the parts of the plant when these can no longer be used: *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa, 426 (120 N. W. 966, 138 Am. St. Rep. 299, 48 L. R. A. (N. S.) 1025). The whole subject involved in this litigation is ably and exhaustively treated in the note to *Kansas City S. Ry. Co. v. United States*, 231 U. S. 423 (58 L. Ed. 296, 52 L. R. A. (N. S.) 1, 34 Sup. Ct. Rep. 125).

There was testimony before the commission to the effect that almost the only freight that could be carried by the Railroad Company consisted of the logs cut from the timber in a restricted section in Columbia County, amounting to about 2,000,000,000 feet, and that when this was exhausted the plant of the company would have only a scrap value. In other words,

aside from the junk value of the plant, it would perish in the using. The doctrine that the shipper should be required to pay such a rate as would not only yield a reasonable return on the value of the property, but also provide for absorbing its depreciation, is abundantly established in cases involving roads which are permanent in their character and which may reasonably be expected to have a flourishing traffic perpetually, or at least as long as carriage by railroad shall continue in vogue. The precept is equally applicable to a road the activity of which is circumscribed by the fact that freight available for it will be exhausted in the near future. The principle is the same, and the two cases differ only in the degree and rapidity of depreciation. A fully equipped railroad, built on a circle with a radius of a hundred miles from the North Pole would be, at the present day, utterly valueless. There would be no traffic for it and nothing to use it for. Differing only in degree would be a railroad running into a logged-off barren where there was nothing for it to haul and no use to which it could be put. There was testimony from which the commission could arrive at the conclusion that this would be the fate of the railroad here involved, in the near future. It was within the scope of the commission's authority to establish such a rate as would amortize this depreciation, as well as to yield to the carrier a fair return for its services. To hold otherwise would be to say that when an individual or corporation devotes property to public uses it amounts to a voluntary sacrifice or thank-offering on the public altar. Under our Constitution no such gratuity is contemplated. In proper cases under the law of eminent domain the public may condemn and take the property of a private concern, of

course accompanied by an award of just compensation. The individual may voluntarily devote his property to the public service, without awaiting condemnation, granting to the public the option of taking it and using it, but only on the condition that such remuneration shall be afforded as will enable the individual to come out even.

Objection is made also to the effect that the commission had no right to consider the discount suffered by the bonds of the company in the market in the endeavor to raise the funds necessary to complete the road. It is by no means clear that the commission included this in making up the valuation of the road. It is true that in the report or decision of the commission the various elements accompanying the construction of the road are tabulated, wherein appears an item grouped with others, of interest during construction. In giving a history of the undertaking, the sale of the bonds is narrated, and in winding up the table of all the items the value of the investment on January 1, 1918, is fixed at \$1,373,778.79. But after considering all of the situation, the commission fixed the value of the property, for rate-bearing purposes, at \$1,263,883, making a difference in the way of deduction of \$109,895.79. This more than covers all the discount in any way connected with the undertaking, which is shown to be \$61,037.50. It is enough to say on this branch of the case that the plaintiffs have not shown that in making up the value of the property for rate-making purposes the commission included anything whatever for discount on bonds. In other words, the plaintiffs have not made out their case on that point. The statute under which they proceed now declares that:

“In all trials under this section, and sections 6911, 6912 and 6913 hereof, the burden of proof [shall] be upon the plaintiff to show by clear and satisfactory evidence that the order of the commission complained of is unlawful, or unreasonable, as the case may be”: Section 6910, L. O. L.

7. We might well rest here, but, as to interest on the investment, it seems that a reasonable rate should be allowed from the beginning of the undertaking. It is fair compensation for the use of the money, and it matters not whether that is paid directly to the company or is passed on to the one from whom the company borrows the money. If the charge is reasonable, it ought to be allowed. It is quite a different thing from allowing a return on what is colloquially known as “watered stock.” No carrier is entitled to a return upon fictitious or inflated values, and this is the principal evil against which rate-making legislation and laws establishing public service commissions have been directed. The intent of the law is to allow a fair compensation based upon fair and reasonable value of the service and the utilities employed. The bench-mark to which the rates are referable is the reasonable value of the plant, which includes all of the elements of fair and reasonable expense in establishing it, qualified, of course, by the depreciation which has already occurred.

In *Chicago & N. W. Ry. Co. v. Railroad Commission*, 156 Wis. 47 (145 N. W. 216, 974), it was held, in substance, that the reference by the commission in its decision to extraneous matters does not necessarily mean that it has reached a conclusion without evidence. And in *State v. Public Service Commission of Washington*, 76 Wash. 492 (136 Pac. 850), it

is taught that the commission has a right to supplement evidence offered by the parties with an inquiry on its own motion, and when so doing is not acting judicially. These cases and others like them dispose of the minor contention of the plaintiffs, urged in their complaint but not insisted upon in their brief, that the commission considered a personal examination of the railroad by one member of the board. The commission is charged, as stated, with statutory duties closely allied to the legislative power of the state. In very truth, it is a part of the co-ordinate branch of the government, with the duties of which the judicial part of the fabric may not interfere, except as already stated, to wit, upon the judicial questions involved.

8. The plaintiffs have not maintained the burden of proof of showing that the commission exceeded its powers or acted in violation of any principle of law. Moreover, in the very nature of things, the factors involved in an inquiry of this kind are so many and so variable that it is impossible to fix rates that will be mathematically correct or exactly applicable to all the new conditions that may arise even in the immediate future. In practice, it is reasonable and just in most instances to give the rates in question a fair trial under actual operation. This is the teaching of *Darnell v. Edwards*, 244 U. S. 564 (61 L. Ed. 1317, 37 Sup. Ct. Rep. 701), a leading case cited by the plaintiffs: See, also, *Lincoln G. & E. Co. v. Lincoln*, 250 U. S. 256 (63 L. Ed. 968, 39 Sup. Ct. Rep. 454). Besides all this, the establishment of a given rate sheet is not absolutely final and conclusive for all time; for new conditions may arise to-morrow which will make unreasonable, one way or the other, a rate which to-day is just and fair. The whole

matter is continually under the scrutiny of the commission, in the exercise of a flexible administrative authority, and can be reopened at any time, either on its own motion or on the petition of interested parties: Section 6906, L. O. L.

For the reasons stated, we are constrained to respect the commission's decision and to affirm the decree of the Circuit Court, without prejudice to renewed inquiry hereafter as the commission may be advised.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BENNETT and JOHNS, JJ., concur.

Argued May 3, affirmed May 25, rehearing denied June 29, 1920.

ALLEN v. MAGILL.

(189 Pac. 986; 190 Pac. 726.)

Waters—Appropriation Requires Beneficial Use as Well as Diversion.

1. There can be no valid appropriation of water unless the water is subject to appropriation, and is not only diverted, but also applied to useful purpose, and no appropriation is valid in excess of what is reasonably necessary for the useful purpose in view.

Waters—Complaint Stating That Plaintiff Appropriated Water of Stream for Irrigation Held Sufficient.

2. A complaint alleging that plaintiff had appropriated all the water of a stream which flowed a specified number of miner's inches during the irrigating season for irrigation of his tract of land, specifically described in the complaint, for which purpose the amount of water was insufficient, sufficiently alleges the appropriation of the water, which is an ultimate fact.

Waters—Federal Desert Land Act Made Water Subject to Appropriation Apart from Land.

3. The Desert Land Act of March 3, 1877 (U. S. Comp. Stats., Sections 4674-4678), separated the land belonging to the United States from the waters flowing thereon, so that anyone who thereafter first appropriated it to beneficial use took it independent of the rights of a subsequent settler on the land.

Waters—Diversion by Trespass Gives No Rights Until Perfected by Adverse Possession.

4. The right to divert water for beneficial use on the land of another does not give the right to enter the other land for that purpose, and a diversion made by trespass on the land of another will not be protected in equity unless possession has been continued adversely long enough to give title by prescription.

Pleading—Reply Alleging Adverse Possession No Departure from Complaint Alleging Appropriation.

5. Under a complaint alleging appropriation of water, plaintiff could show appropriation upon unoccupied government land or upon private land with consent of the owner, or appropriation by trespass to which title had been perfected by prescription, so that a reply alleging adverse possession merely strengthens the complaint and is not subject of demurrer on the ground of departure.

Waters—Evidence Held to Show Appropriation to Beneficial Use.

6. Evidence showing that for more than twenty years continuously plaintiff had diverted and applied to his land described in the complaint the water from a stream *held* sufficient to establish his appropriation and entitle him to an injunction notwithstanding differences in the testimony of the different witnesses

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc.

This is a suit to enjoin the defendants from diverting the waters of a small unnamed stream in Wallowa County, to the exclusive use of all of which waters the plaintiff claims the right. In his complaint he describes his land by legal subdivisions, states that the stream in question has its source south of his property and flows northerly upon his premises, the average flow thereof being about 13 miner's inches during the irrigating season of each year, and then makes this allegation:

“That on or about the — day of —, 1884, plaintiff diverted and appropriated all of the waters of said stream, and so diverted and appropriated the same for the irrigation of a part of said lands of plaintiff and for the furnishing of motive power for the operation of a churn on said lands; and on or about said — day of —, 1884, plaintiff used and applied all of the waters of said stream for the irrigation of a part of said lands and the operation of

such churn; and ever since said — day of —, 1884, all of the water of said stream has been, and now is, used by plaintiff on said lands owned by plaintiff, and such use has been continuous and uninterrupted.”

The complaint further states, in substance, that the plaintiff gradually increased the irrigable space on his land until it aggregated 118 acres, which for more than twenty years last past he has, and does now, irrigate. It is averred that the use of the water is indispensably necessary for raising crops on said lands.

The plaintiff charges that on July 20, 1917, the defendants wrongfully diverted the waters of said stream and conducted them upon land other than his said premises, which wrongful diversion has been continued to the present time by the defendants. It is said in the complaint:

“That the diversion, appropriation and use of said waters by plaintiff has been, and is, long prior in time and in right to the diversion of said waters by defendants, or by either of them or by any other person, persons, firm or corporation; and by reason thereof plaintiff is entitled to the use of all of the waters of said stream.”

Finally averring that the defendants unless enjoined will continue to divert the waters away from his land, the plaintiff prays that they be perpetually restrained from so doing.

The defendants filed a general demurrer against this complaint, which was overruled. They answered, stating that they “admitted all the allegations of said amended complaint, beginning with line numbered 9 and ending with line numbered 21, of page 1 thereof.” Owing to the difference between the manuscript complaint and the printed record, this

admission is unintelligible. Affirmatively the defendants say, in substance, that the defendant Magill and his predecessors in interest have been and now are the owners of certain lands lying south of the plaintiff's holding, and upon which the stream in question takes its rise. Magill also is said to own other lands lying north of those of the plaintiff, and it is stated that all of that defendant's lands are improved agricultural tracts, requiring irrigation in order to maintain their value and productiveness. It is stated that the stream rises on Magill's property, flows through the same and naturally supplies water to it, and that for more than thirty-five years last past the waters of the stream have flowed in a natural channel, subirrigating Magill's lands, during all of which time he and his predecessors have used the same for stock water and for artificial irrigation upon 45 acres of his property, continuously, uninterruptedly, openly, visibly and notoriously, under a claim of right by Magill and his predecessors hostile and adverse to any claim of the plaintiff and his predecessors in interest. The defendants avow that the use of the water of said stream, and the whole thereof, is necessary to enable Magill to cultivate his lands, without which they would be greatly damaged and impaired in value. It is said, in substance, that the other defendant uses the water only by the permission and license and as a tenant of Magill. The answer prays for a dissolution of the injunction and that the plaintiff be enjoined from interfering with the waters of the stream.

The reply admits Magill's ownership of the lands as stated in the answer, but says that he did not become the owner thereof until subsequent to the year 1887. The source of the stream as averred in the

answer is admitted by the reply. After stating new matter, which is not necessary here to be considered, the reply concludes with a further and separate averment of new matter as follows:

“That ever since the — day of —, 1884, plaintiff has possessed, owned and used, and is now possessing, owning and using, all of the water of the stream mentioned and described in the answer herein, and plaintiff has so possessed, owned and used, and is now possessing, owning and using, all of the water of said stream for the irrigation of plaintiff’s lands described in the amended complaint herein, and in the manner as is alleged in said amended complaint. And such possession, ownership and use of said water by plaintiff ever since said — day of —, 1884, has been and is actual, open, exclusive, notorious, visible, hostile, adverse, continuous and uninterrupted and with the knowledge of defendant, Magill, and his predecessors in interest, and against any and all right, or claim of right, of said defendant, Magill, and his predecessors in interest.”

The defendants demurred to the part of the reply last above quoted, but the demurrer was overruled.

At the opening of the trial of the cause the defendants objected—

“to any and all evidence or testimony offered by the plaintiff in support of his complaint, for the reason that it is not alleged and it does not show a right to this water under either of the recognized heads known in this state: First, he does not say that he appropriated this water while the lands over which he has diverted it belonged to the United States government, which we claim is essential as a foundation for the right known as prior appropriation; second, he does not show a right by adverse user, because in the complaint he does not show that his use is open, adverse or hostile to any claims of the defendant, or anyone else, for such period of time as would constitute a right under the statute of limitations or otherwise.”

The objection was overruled by the court, and the case was tried on the theory that this objection was to be considered as urged against all the testimony offered by the plaintiff in support of his suit. Disregarding all attacks upon the complaint and against the testimony for the plaintiff, the court made findings and entered a decree in favor of the plaintiff, substantially according to the prayer of the complaint. The defendant Magill appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Daniel W. Sheahan*.

For respondent there was a brief and an oral argument by *Mr. A. S. Cooley*.

BURNETT, J.—The allegations quoted from the complaint constitute all of the matter upon which the plaintiff in that pleading predicates his right to the water in question.

1. We will first determine the validity of the general demurrer to the complaint. The contention of the defendant is that the plaintiff must show in his complaint not only that he took the water and applied it to a useful purpose, but also that the place of appropriation was upon unoccupied land belonging to the United States. The argument of the defendants seems to be that merely to say that the plaintiff appropriated the water is but to state a conclusion of law, and that facts should be averred from which the court could draw the conclusion that there had been an appropriation; in other words, that all of the elements of a valid appropriation should be alleged. It is true that there can be no valid appropriation unless the water is subject thereto and is not only diverted, but also applied to a useful pur-

pose; and further, that no appropriation can be predicated of excess in the use of water beyond what is reasonably necessary for the useful purpose in view. Like ownership, appropriation is an ultimate fact: 17 Ency. Pl. & Pr. 328. A discussion of pleading an ultimate fact is found in *Oregon Home Builders v. Montgomery Investment Company*, 94 Or. 349 (184 Pac. 487), in an opinion by Mr. Justice HARRIS. In *Ely v. New Mexico etc. Ry. Co.*, 129 U. S. 291 (32 L. Ed. 688, 9 Sup. Ct. Rep. 293, see, also, Rose's U. S. Notes), we find the statement of the principle in the syllabus, reading thus:

“An allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee, is sufficient without setting out matters in evidence, or what have sometimes been called probative facts, which go to establish that ultimate fact.”

In *Hague v. Nephi Irrigation Company*, 16 Utah, 421 (52 Pac. 765, 67 Am. St. Rep. 634, 41 L. R. A. 311), applying particularly to the appropriation of water, the precept is thus stated in the syllabus:

“Where the allegations of a complaint in a suit brought to determine the plaintiff's right to the use of water of a stream state, in general terms, a cause of action by alleging clearly and distinctly ownership, invasion of rights, and injury, without distinct allegations of how plaintiff became the owner of a water right, whether by appropriation, adverse user, or purchase, plaintiff's title can be shown by proof, and the allegations will be sufficient to withstand a general demurrer.”

An analogy may be drawn from *Rogers v. Miller*, 13 Wash. 82 (42 Pac. 525, 52 Am. St. Rep. 20), where it is held that in an action to quiet title an allegation of ownership in fee admits proof of any title, including that acquired by adverse possession. On the

question of stating ownership as an ultimate fact, see, also, *Turner v. White*, 73 Cal. 299 (14 Pac. 794); *Heeser v. Miller*, 77 Cal. 192 (19 Pac. 375); *Souter v. Maguire*, 78 Cal. 543 (21 Pac. 183); *Johnson v. Vance*, 86 Cal. 128 (24 Pac. 863); *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29 (41 Pac. 1024); *Hanscom v. Hinman*, 30 Mich. 419. There are cases in Colorado, such as *Farmers' High Line etc. Co. v. Southworth*, 13 Colo. 111 (21 Pac. 1028, 4 L. R. A. 767), and *Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421 (94 Pac. 339, 15 L. R. A. (N. S.) 238), which hold that:

“In pleading an appropriation of water, the acts constituting such appropriation must be stated and not merely legal conclusions, so that, upon an inspection of such pleading it can be determined whether or not the facts stated constitute, in law, a valid appropriation of water for a beneficial use.”

The pleadings in these cases state that the water had been diverted, but fail to aver that it had been applied to any useful purpose, and on account of such omission the court held that the complaint stated merely conclusions of law.

2. That objection is met in the instant case by the allegations to the effect that the water was used for the necessary irrigation of the lands of the plaintiff, making the same more valuable for pasturage and crops which cannot be raised without irrigation. In *Porter v. Pettingill*, 57 Or. 247 (110 Pac. 393), Mr. Justice EAKIN writing the opinion, it was held that:

“A complaint to determine the priority of irrigation water rights is insufficient where it does not * * show that any particular land needed irrigation, does not specify the amount of water diverted nor the amount needed to the acre, or for any specific land, and does not show how much water plaintiffs' gran-

tors acquired a right to use; an allegation that plaintiffs were entitled to all the water in a creek during the dry season being too indefinite.”

3. In this case, although the plaintiff claims all of the water in the stream in question, yet the amount thereof is alleged. The lands to which it is applied are described with particularity, and it is shown, in substance, that even the amount mentioned is not sufficient for proper irrigation of the land. The record shows that all of the lands involved in this suit were acquired from the United States after the passage of the Desert Land Act of March 3, 1877, Chapter 107 (19 Stats. at L. 377, U. S. Comp. Stats., §§ 4674-4678, 8 Fed. Stats. Ann. (2 ed.), pp. 692-696).

In *Hough v. Porter*, 51 Or. 318, 406 (95 Pac. 732, 98 Pac. 1083, 102 Pac. 728), Mr. Commissioner King, discussing the congressional legislation mentioned, reaches the following conclusion:

“Congress could reasonably presume that, if an appropriation were desired for the purposes mentioned in the act, some steps would be taken manifesting such intent, and that, if the owner is not the first to move in that direction, the person making an application thereof to a beneficial use within a reasonable time ought to be rewarded for his diligence, and he is entitled to have his rights in that respect recognized and protected. For this reason the settler who has acquired title to the land through which any stream may flow, took it subject to the rights of the person who has or who may subsequently make the first use of such stream for the purposes enumerated in the act, excepting only as to the natural wants and needs of such settler.”

4. The course of reasoning seems to be that, under the Desert Land Act, Congress has divorced the water from the public domain through which it flows, and as to all surplus water over and above what the

settler may divert upon his land, for a useful purpose within the purview of the statute, has declared that it "shall remain and be free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." The conclusion suggested is that as to all land claimed by a settler after the passage of the Desert Land Act, he takes it thus separated from the waters flowing thereon, so that anyone thereafter who first appropriates the water will take it independent of his rights thereto, beyond his mere domestic use. This, however, does not give anyone a right to go upon the lands of the settler without his permission, to divert the waters flowing through the same. Although the water is subject to appropriation, the right to appropriate must be exercised without trespass upon the land of another. The water may be running on its natural course and subject to appropriation, but no one can enjoy this bounty of the government unless he can get to the water. He may avail himself of the permission of the government to approach the stream on its land. He may secure by purchase or gift the consent of private owners to gain access over their lands, and by adverse possession for the statutory prescriptive period he may maintain his appropriation as against private owners over whose lands he has conducted the water: *Caviness v. La Grande Irr. Co.*, 60 Or. 410, 420 (119 Pac. 731). A court of equity will not aid one who takes the water without right in the first instance, unless his possession has been continued adversely long enough to give him title by prescription.

5. We conclude that the allegations of the complaint are sufficient as against general demurrer to allow the plaintiff to prove an appropriation of the

water as against the general issue. Neither is the new matter in the reply a departure from the complaint. In support of his allegation of appropriation, the plaintiff can show either that he entered upon unoccupied government land and found the water subject to appropriation under the Desert Land Act, and from that point diverted it to his own premises, in which instance he would be relying upon the promise given by the then riparian owner, the government of the United States, expressed in that legislation; or he could also show that by the permission of a private riparian owner he had a similar license to appropriate the water; or, finally, he could show that, although the owner of the bank washed by the public waters had not given his consent to divert the stream, yet he had gone upon that land and had taken out the water and maintained his adverse possession thereof for the prescriptive period. All this under the best considered authorities can be shown under the general allegation of appropriation and application to a specified useful purpose. 'In the light of this rule the new matter in the reply alleging adverse possession merely restates in detail what could be proved under the complaint as already framed. In other words, it is not a divergence from, but rather a strengthening of the complaint, and hence is not amenable to demurrer on the ground of departure: *Moore v. Clackamas County*, 40 Or. 536 (67 Pac. 662); *Goodwin v. Tuttle*, 70 Or. 424 (141 Pac. 1120); *Mascall v. Murray*, 76 Or. 637 (149 Pac. 517, 521).

6. A careful reading of the testimony in the record, considered with the exhibits offered in evidence, convinces us that for more than twenty years continuously next prior to the commencement of the suit,

the plaintiff diverted and applied to his lands specified in the complaint all the water of the stream at the point where it enters the south boundary of his land, all without interruption and adversely to all other claimants until the act complained of, the diversion of the water by the defendants, occurring in 1916 and 1917. The uncontradicted testimony of a witness for the plaintiff shows the amount of the water diverted to be $12\frac{3}{4}$ miner's inches, and the testimony abundantly shows that it has been applied upon 15 to 18 acres of plaintiff's land on the west side of the stream and 50 acres on the east side, besides being used to water domestic animals and for household purposes on the west side. Thus are met all the requisites of appropriation. The water was reserved from the land in a measure by the Desert Land Act and made subject to appropriation. The holders of all of the realty mentioned in the pleadings took with notice of that act. The plaintiff has gained access to that public water. He has at least shown that he has maintained his actual diversion of the water for the useful purpose of irrigation for more than the prescriptive period, adversely to all others, and hence has proved the allegations of his complaint. On the other hand, the showing is ample that by reason of affluent springs below the point of the plaintiff's diversion, coupled with the run-off of upstream irrigation, the land of the defendant Magill lying downstream from that of the plaintiff has an abundance of water. As to Magill's holdings south and above the plaintiff's premises, the grievance complained of consisted of an attempt to apply water to land hitherto unbroken, and hence subordinate to the plaintiff's appropriation.

As usual in such cases, the witnesses are not all agreed, but the decision of the learned judge sitting in the original trial, who heard them, saw them and observed their demeanor on the witness-stand, is entitled to our consideration. Under all these circumstances of pleading and evidence, we think the decree of the Circuit Court should be affirmed.

AFFIRMED.

Denied June 29, 1920.

PETITION FOR REHEARING.

(190 Pac. 726.)

On petition for rehearing. DENIED.

Mr. D. W. Sheehan, for the petition.

Mr. A. S. Cooley, contra.

BENSON, J.—The defendant has presented a petition for rehearing in this case, wherein it is very earnestly contended that the conclusions reached in the original opinion herein are not justified by the evidence. We have therefore made a careful review of the record, and the result is that our former opinion is confirmed thereby. It is true that many years ago there was some sort of an agreement between the plaintiff and defendant's predecessor in interest whereby arbitrators made a division of the waters of the stream, but defendant's predecessor found that the water so allotted to him was so inadequate as to be valueless, and was abandoned more than ten years prior to the commencement of this suit. The petition for rehearing is therefore denied.

AFFIRMED. REHEARING DENIED.

Argued April 22, affirmed June 1, rehearing denied June 29, 1920.

TILLAMOOK COUNTY v. JOHNSON.

(190 Pac. 159.)

Eminent Domain—Owner Entitled to Damages for Constructing and Maintaining Fences Made Necessary.

1. Where by condemning a road lands were divided, so that it was necessary for the owner to fence both sides, he is entitled to damages not only for the expense of constructing the fence but for maintaining the same.

Eminent Domain—In Condemnation Proceeding Defendant must Specify the Damages Which He Seeks to Prove.

2. In proceeding to condemn land for public road, defendants should specify in their answer the damages which will result, and evidence of damage not so specified is inadmissible.

Eminent Domain—Instruction Limiting Damages to That Specified in the Answer Held Harmless.

3. In eminent domain proceedings, instruction which limited the damages to that specified in the answer was harmless, though erroneous; evidence of damages not specified having been received.

Appeal and Error—Opinion Evidence as to Value of Attorney's Services not Binding.

4. In reviewing an award of attorney's fees, opinion evidence as to the value of attorney's services is not binding on the appellate court.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2.

The plaintiff, a municipal corporation, seeks to condemn a strip of land 60 feet in width, lying 30 feet on each side of the center line of the coast highway survey, through the land of the defendants Frank and Marie Johnson in Tillamook County, Oregon. The County Court of that county duly adopted a resolution declaring it necessary to acquire the strip for road purposes. The complaint states that the County Court has been unable to agree with the defendants upon the price, and that the damages to said defendants for the taking thereof do not exceed

\$700. The state land board held a mortgage on the property involved, and for such reason its officers were made defendants.

The answer of the Johnsons admits the material allegations of the complaint except as to the amount of damages, and as a further and separate defense alleges their ownership of the land, possession of which the plaintiff had taken and held by force and arms, and declares that the land so taken, including the timber thereon, has a value of \$950. This pleading further alleges:

“That the said strip of land seized and held by the plaintiff so divides and severs the lands of the defendants, contiguous and adjacent thereto, encumbers the said lands with additional burdens, casts thereon timber debris and waste taken from the strip aforesaid and thrown upon said contiguous and adjacent lands; that the last mentioned are depreciated in value by reason of the plaintiff's said acts in the sum of seven hundred and fifty (\$750.00) dollars.

“That in order that the defendants shall at all times have the use and enjoyment of the said land contiguous and adjacent to the said strip of land seized by the plaintiff, it will be necessary for the defendants to build two fences along each side of the strip of land taken and seized as aforesaid by the plaintiff, at an expense of not less than four hundred and fifty (\$450.00) dollars.

“That it will also be necessary for the defendants to maintain gates and passage ways from one portion to the other of said adjacent and contiguous lane to the defendants' further damage in the sum of five hundred dollars.

“That five hundred (\$500.00) dollars is a reasonable attorney's fee for defending this action.”

The answer concludes with a prayer for judgment for \$2,650, together with \$500 as attorney's fee, and costs.

The reply admits the ownership of the premises as alleged, but "denies each and every other allegation" of the answer.

A trial was had, and the jury, after viewing the premises, returned a verdict to the effect "that the defendants, Johnson, are entitled to damages herein in the sum of \$775, the cash market value" of the land actually taken, and to the further sum of \$150 as reasonable attorney's fee, but that they should not recover on account of any other damage. Thereupon judgment was entered that—

"Upon the payment of such damages and attorney's fee the land should be condemned and appropriated by the plaintiff for a county road."

The Johnsons appealed, claiming that the trial court erred in charging the jury in effect that the maintenance of fences to be constructed by them along the boundary line of the road through their premises was not an element of damage to be considered by the jury, and in refusing to give defendants' requested instruction No. 5. They also insist that there is no evidence upon which a jury could make a finding of less than \$300 as attorney's fee.

AFFIRMED..

For appellants there was a brief over the name of *Messrs. Johnson & Handley*, with an oral argument by *Mr. Thomas B. Handley*.

For respondent there was a brief with oral arguments by *Mr. T. H. Goyne*, District Attorney, and *Mr. Webster Holmes*.

JOHNS, J.—1. It appears from the bill of exceptions that the length of the strip of land sought to be condemned is 2,581 feet; that it would divide the

lands of the appellants; that it would be necessary to fence each side of the strip, and that the cost of constructing the fences and gates would be approximately \$400. After such evidence had been offered, Elmer Hall, as a witness for the defendants, testified over the objection of the plaintiff that when the fences were constructed the yearly cost of maintaining them would be about \$50. In the first portion of its charge, the court instructed the jury that—

In arriving at the amount of appellant's damages, it might

“consider the necessity of the improvements and expenditure of money and labor which the defendants will be required or compelled to make on account of the appropriation or construction of the highway in order to enjoy reasonably such lands to the same extent as before the appropriation, such as the building and maintaining of fences and gates, the reopening or restoring of the passageways upon the land in going to and from one part to another.”

Thereafter, upon the question of resulting damages, the court told the jury that the defendants would be entitled to recover “the reasonable cost of the construction of a reasonable fence on each side of the right of way, as part of the damages.”

When the court had given its charge and before the jury had retired, the following dialogue occurred between the court and counsel for the appellants:

“Counsel.—The court instructed the jury that they are entitled to consider the cost of the construction of the fence, but there was nothing said about the maintenance of the fence after it was constructed.

“Court.—I do not think the maintenance of the fence would be an element of damages. I think the cost of construction is an element of damages, but not the maintenance.

“Counsel.—We except to the court's refusal to instruct the jury that the cost of maintenance of the

fence, after construction along the right of way, would be an element of damages in the case. And to the instruction of the court that it would not be an element of damages.”

The first portion of the charge was correct. Lewis on Eminent Domain, Volume 2, Section 498, says:

“Where, by taking a part of a tract, additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land; then the burden of constructing and maintaining such fence in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages. * *. It is a question of damage to the land, as land. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence, as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it.”

The effect of the second instruction and the subsequent proceedings between court and counsel was to nullify the first instruction and take from the jury consideration of the cost of maintaining the fences. Under proper pleadings, this would have been reversible error.

2, 3. It devolved upon the appellants to make proper allegations in their answer as to how and why they would suffer damages, and to prove their claim by competent testimony. Although in a part of their answer above quoted they allege “that, in order that the defendants shall at all times have the use and enjoyment of the said lands contiguous and adjacent

to the said strip," it will be necessary for them to build fences along each side of the strip at an expense of not less than \$450; it will be noted that there is no allegation concerning the cost of maintaining such fences. Testimony regarding this cost was received over the plaintiff's objection, which, under the pleadings, should have been sustained. Hence, although instructions upon that point were erroneous, as a matter of law, they were not prejudicial.

4. The appellants contend that there was no testimony which would sustain a verdict for any less amount than \$300 as attorney's fee. In *Wright v. Conservative Inv. Co.*, 49 Or. 177 (89 Pac. 387), this court held that the amount of an attorney's fee is not within the discretion of the court, but should be determined from the evidence; and that where the only testimony fixed \$50 as a reasonable fee, a finding of \$30 was not supported. That principle was modified and in legal effect overruled by the opinion in *Lockhart v. Ferrey*, 59 Or. 179 (115 Pac. 431), which held that on appeal this court is not bound by opinion evidence as to the amount of attorney's fee to be allowed on a contract. Here, the only evidence on the subject before this court is the testimony of attorney Mannix, incorporated in the bill of exceptions, based upon which the jury found that \$150 was a reasonable fee. After a careful reading of the record, we cannot say as a matter of law that there is no evidence to support that finding.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and BENNETT, JJ.,
concur.

Motion to dismiss appeal allowed June 29, 1920.

RUSSELL v. SMITH.

(190 Pac. 715.)

**Appeal and Error—Transcript not Filed Within Thirty Days—
Effect.**

1. Where an appeal was perfected April 16, 1920, and no order extending the time for filing the transcript appeared of record, the appeal will, under Section 554, L. O. L., as amended by Gen. Laws of 1913, page 618, requiring the transcript to be filed in thirty days, be dismissed, under subdivision 2, if the transcript is not filed within the required time.

Appeal and Error—Dismissal of Appeal—Judgment Against Sureties.

2. Where an appeal was dismissed, under Section 554, subdivision 2, L. O. L., as amended by Gen. Laws of 1913, page 618, for failure of appellant to file a transcript within thirty days, judgment will, under subdivision 3, be enforced against the appellant and his sureties.

From Crook: T. E. J. DUFFEY, Judge.

In Banc.

On motion of respondent to dismiss appeal.

APPEAL DISMISSED.

Mr. M. R. Elliott, for the motion.

Mr. M. E. Brink and *Mr. Jay H. Upton*, contra.

McBRIDE, C. J.—This is a motion to dismiss an appeal.

The defendant received a judgment in the court for costs and disbursements, from which judgment plaintiff appealed.

1. The judgment was rendered on February 17, 1920, and the notice of appeal and undertaking were served on defendant on April 10, 1920. The appeal was therefore perfected on April 16, 1920. No order extending the time to file a transcript on appeal appears of record. Section 554, L. O. L., as amended

by Chapter 320, Gen. Laws of 1913, requires that the appellant shall file a transcript on appeal within thirty days after the appeal has been perfected. The transcript was therefore due here at the latest on the seventeenth day of May, 1920, but no transcript has been filed. Defendant moves to dismiss the appeal.

2. Subdivision 2 of Section 554, L. O. L., as amended by Chapter 320, Laws 1913, provides that if the transcript is not filed within the time provided, or within any extension of such time, the appeal shall be dismissed. Subdivision 3 provides that upon such dismissal the judgment may be enforced by the appellate court against the appellant and his sureties.

The appeal will therefore be dismissed and the judgment affirmed, both against the appellant and his sureties, with defendant's costs and disbursements in this proceeding.

APPEAL DISMISSED.

Submitted on brief June 8, reversed and decree rendered June 29, 1920.

STEELE v. STEELE.*

(190 Pac. 716.)

Divorce—Evidence—Sufficient to Show Personal Indignities.

1. Where defendant had frequently stated with profanity that he did not care for plaintiff and had refused to permit her to return home after she went to take care of his sick mother, the charge of personal indignities rendering life burdensome, which is ground for divorce under Section 507, L. O. L., was sustained.

*On indignities rendering condition intolerable or life burdensome as grounds for divorce, see notes in 18 L. R. A. (N. S.) 30; 34 L. R. A. (N. S.) 360.

On liability of father for support of children as affected by decree awarding custody to mother, see note in 2 L. R. A. (N. S.) 851.

**Divorce—Grounds—Personal Violence Unnecessary to Constitute
“Personal Indignities.”**

2. To constitute personal indignities which are a ground for divorce under Section 507, L. O. L., it is not necessary that there be actual personal violence or attempt at personal violence.

[On necessity of personal violence to constitute cruelty warranting divorce, see note in 9 Ann. Cas. 1090. On habits or conduct of spouse as cruelty warranting divorce, see note in Ann. Cas. 1918B, 480.]

**Divorce—Custody of Children—Defendant Earning \$50 per Month
Required to Pay \$15 per Month for Support of Daughter.**

3. Where plaintiff had been awarded a divorce with custody of her 14-year old daughter, but it appeared that defendant had no property except his earnings, and that he was in poor health and capable of earning only about \$50 per month, he will be required to pay \$15 per month for the support of the daughter.

From Marion: GEORGE G. BINGHAM, Judge.

In Banc.

This is a suit for divorce by Belle Steele against D. D. Steele. From a decree for defendant, the plaintiff appeals. REVERSED AND DECREE RENDERED.

For appellant there was a brief submitted over the name of *Mr. M. E. Pogue*.

For respondent there was a brief prepared and submitted by *Messrs. Smith & Shields*.

BENNETT, J.—This is a suit for divorce brought by Mrs. Steele, the plaintiff. The plaintiff and defendant had been once married and divorced, but became reconciled and remarried,—largely on account of their daughter, apparently, who is now about fourteen years of age.

The suit is brought on the ground of cruel and inhuman treatment and personal indignities rendering life burdensome.

The plaintiff testified:

“He wasn’t kind and he told me repeatedly he didn’t care for me. The words he used, ‘He didn’t give a damn for me,’ and it was only because of our daughter that he lived with me * * When I went after my trunks he told me he didn’t give a damn for me; that he had ceased to love me.

“Q. Now, there is a statement here that sometime in 1918 you asked him for money for treatment by a physician. State to the court what was said at that time.

“A. Well, my health was very poor at that time, and I asked him for money to come to town. I was taking treatments, and he wouldn’t give me any, and I made the remark, ‘Donald, if you don’t give me money, how do you expect me to get it?’ And he said, ‘I don’t give a damn how you get it or where you get it.’ ”

Finally the plaintiff went to Salem to take care of the defendant’s mother, who was very old and very sick, and who was living at the home of defendant’s sister in Salem. After being at Salem for the purpose of taking care of his mother, for a week or two, she went back to Turner, where she and her husband lived, to attend the graduating exercises of her daughter. He didn’t want her to return to Salem, and when she explained that there was no one else to help his sister take care of their mother, and that they had arranged to go back, he told her if she went to Salem to stay and never come back to his home again, and he has never since consented to her returning home.

All of this is corroborated by the daughter and by defendant’s sister, who testified—and the defendant himself admits—that he ordered her to stay away if she went to Salem to take care of his mother, and

that he has never since been willing for her to come back. And defendant's own sister testified that at different times she had heard him say in the presence of the plaintiff that "he didn't care for her, that he had ceased to love her, and that he would never live with her again."

The defendant makes no defense except as to the matter of support for the daughter, but the district attorney appears on behalf of the state and contests the divorce.

There is no evidence or claim that plaintiff has ever misconducted herself in any way or been guilty of any kind of unlawful conduct.

1. We think the evidence is sufficient to sustain the charge of personal indignities. Section 507, L. O. L., provides that the marriage contract may be dissolved for "cruel and inhuman treatment or personal indignities rendering life burdensome."

We do not see how it could be otherwise than to make a woman's life burdensome, to live with a husband who had ceased to care for her, and who did not want to live with her and was frequently telling her so in such a coarse and brutal way, and that he did not "care a damn for her." We think no good purpose could be served by compelling a woman to live with a man under such circumstances.

2. It was supposed at one time that actual personal violence, or attempt at personal violence, was necessary to constitute cruel and inhuman treatment or personal indignities; but it is now well settled that that is no longer the law, if it ever was.

Section 88, 19 C. J., states the law thus:

"It was formerly thought that actual bodily harm, or apprehension thereof, must be shown to authorize

granting a divorce on the ground of cruelty, and this doctrine seems still to prevail in a few jurisdictions; but this view has been generally repudiated, and the modern doctrine is that any unwarranted conduct by either spouse which causes the other mental suffering of sufficient degree constitutes such cruelty as will authorize a divorce."

There are no two cases exactly alike, but we think this case is well within the principles announced by this court in *Lisenby v. Lisenby*, 89 Or. 273 (173 Pac. 888), and *Railsback v. Railsback*, 92 Or. 623 (182 Pac. 131). We think the plaintiff is entitled to her decree of divorce and for the custody of the daughter.

3. As to the allowance for the support of the daughter there is some difficulty. The parties seem to be working people and are poor. Neither of them have anything except their earnings. The defendant is engaged in the butcher business, apparently in a small way, in Turner, and his only revenue is from that business. His testimony in relation to the matter is undisputed, and he claims his receipts from the business over and above the expenses, are about \$50 per month. As we have said, these people are working people, and the daughter has now reached the age where she can help some in her own support.

The defendant, according to his testimony which is also undisputed, has lately been sick and partly paralyzed for a period of three or four months, and he has never entirely recovered his health, and is not able to do hard work. We think under the circumstances he should contribute \$15 a month toward the support of the daughter during her minority if she shall continue to remain dependent upon her mother and to live with her during that time. This is a meager sum, it is true, but under the circumstances it seems all the father will be able to contribute after

he takes care of his own living and necessary personal expenses.

The decree will be so framed.

REVERSED. DECREE RENDERED.

Argued May 26, modified June 29, 1920.

MARTIN v. GAULD CO.*

(190 Pac. 717.)

Master and Servant—Evidence—Contract—Avoidance of Written Resignation—Pleading—Confession and Avoidance.

1. In an employee's action for wrongful discharge, prior to termination of contract, evidence that employee's written resignation and acceptance was at request of the employer and merely for purpose of appearances, was inadmissible, in absence of a plea in confession and avoidance.

Master and Servant—Resignation—Cannot Recover for Wrongful Discharge—Contract.

2. An employee, tendering his written resignation, which is accepted by the employer, cannot recover for wrongful discharge prior to termination of contract, though the resignation was at the employer's request and was made merely for the sake of appearances.

Master and Servant—Action—Variance.

3. In an action for wrongful discharge, variance between allegation that plaintiff was employed at a fixed salary per month and 10 per cent profit during the year, after deduction of an amount equal to 10 per cent of the capital stock, and proof that he was employed at such a salary, and that it was subsequently agreed that he was to receive the 10 per cent of the profits, *held* not fatal, under Section 97, L. O. L.

Master and Servant—"Profits"—Construction—Question for Court.

4. In employee's action for wrongful discharge in violation of contract entitling him to certain per cent of profits, where there was no understanding between the parties as to what should constitute profits, the interpretation of the contract with respect to the meaning of the term "profits" *held* for the court.

*On right to service reward or bonus, of servant discharged without cause before stipulated term of service, see note in 44 L. R. A. (N. S.) 1214. REPORTER.

Appeal and Error—Judgment—Good as One Cause of Action not Reversed—Verdict.

5. In action on two counts, appellate court, in holding judgment correct as to first cause of action and incorrect as to other cause of action, will not reverse judgment, though verdict of jury was for a single sum, where the amount to which plaintiff was entitled under the first cause of action could be ascertained from the record, and the appellate court in such case will affirm judgment as to first cause of action and reverse it as to second cause of action.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

This is an action wherein plaintiff seeks to recover damages for breach of a contract of employment. The complaint sets up two causes of action. In the first it is alleged that in February, 1916, defendant employed plaintiff as its manager and agreed to pay him \$250 per month, and in addition thereto 10 per centum of the profits made by defendant during the year 1916, after deducting from such profits 10 per centum of the capital stock of defendant. It is alleged that plaintiff fully performed his obligations under the agreement; that the business during that year earned a profit of \$42,000, and that after deducting 10 per centum of the capital stock, \$15,000, there remained a profit of \$27,000, of which plaintiff is entitled to 10 per cent, or \$2,700; that the fixed salary of \$250 per month has been paid, but that defendant refuses to pay the agreed share of the profits to plaintiff, and he therefore asks judgment thereon for \$2,700.

The second cause of action avers that in February of 1917, defendant employed plaintiff as its manager, agreeing to pay him a fixed salary of \$350 per month, for the full year, and in addition thereto agreed that, if defendant's stock of merchandise should be reduced to a value not exceeding \$170,000, and accounts

and bills receivable reduced to and maintained at a sum not exceeding \$120,000, and defendant's indebtedness to the bank reduced to and maintained at a sum not exceeding \$85,000, then and in that event defendant would pay to plaintiff as additional compensation 10 per centum of the profits received in money during said term of employment. It is then alleged that on August 1, 1917, defendant wrongfully discharged plaintiff, without cause, thereby preventing him from bringing the business to the agreed basis, and earning the 10 per centum of profits provided for in the contract, as he otherwise would have done. For this cause he prays for damages in the sum of \$5,000.

Defendant's answer to the first cause of action is a denial. As to the second cause of action, defendant alleges that on August 1, 1917, without having complied with any of the conditions to entitle him to compensation under the profit sharing agreement, he voluntarily abandoned the employment and abandoned all efforts to comply with the conditions and earn the additional compensation. It is further alleged that on August 1, 1917, defendant's stock of merchandise amounted to \$208,918.68, its bills and accounts receivable amounted to \$152,616.26, and its indebtedness to the bank amounted to \$95,000. It is also averred that his salary of \$350, per month had been paid in full to August 1.

Plaintiff's reply consists entirely of denials. The cause was tried to a jury, resulting in a verdict and judgment in favor of plaintiff in the sum of \$4,450, from which defendant appeals:

AFFIRMED IN PART. REVERSED IN PART.

For appellant there was a brief over the name of *Messrs. Flegel, Reynolds & Flegel*, with an oral argument by *Mr. John W. Reynolds*.

For respondent there was a brief over the name of *Messrs. Malarkey, Seabrook & Dibble*, with oral arguments by *Mr. E. B. Seabrook* and *Mr. A. M. Dibble*.

BENSON, J.—In considering this case, we shall adopt the order pursued by counsel, and in the first instance direct our attention to the second cause of action. This cause must stand or fall upon the question as to whether plaintiff resigned his position or was wrongfully discharged. Plaintiff testifies that on the evening of August 1, Mr. Flegel, as a managing director of the defendant corporation, said to him, “Well, I tell you, Martin, Mr. Alvord and I have decided that we should change the management of the company, you had better retire.” To which the plaintiff replied, “All right.” And that thereafter some discussion occurred looking to a purchase, by him, of the business, and that on the next morning he wrote and mailed this letter:

“The Gauld Company,
“Corner 12th and Everett St.
“Portland, Or., Aug. 2, 1917.

“Mr. A. F. Flegel,

“Dear Sir: The financial consideration is too heavy for me to assume at this time. I herewith hand you my resignation as Manager of the Company. I will be pleased to have you so regulate matters so I may get away as soon as possible. However will gladly stay as long as you think necessary to show my successor whatever is required.

“Wishing my successor, yourself and the Company the best of success, I am,

“Respectfully,

“V. F. MARTIN.”

In reply to which he received the following:

“Flegel, Reynolds & Flegel,

“Attorneys at Law,

“Portland, Oregon, Aug. 3, 1917.

“Mr. V. F. Martin,

“c/o The Gauld Company,

“69 N. 12th St., City.—

“My dear Martin: I have your letter of Aug. 2nd, with the information that the financial burden was too heavy for you to assume in connection with the purchase of the Gauld Company business, and sincerely regret your inability to make your financial arrangements, for the reason that I was determined to give you every preference, both in regard to price and to terms, but I was seriously afraid that the investment was, as you have found, too large.

“The board of directors have determined to accept your resignation, to take effect immediately, and you are hereby authorized to draw a check for your August salary, and turn the business over to Mr. Creasey, assistant manager.

“Yours very truly,

“BOARD OF DIRECTORS OF THE GAULD COMPANY,

“BY A. F. FLEGEL.”

Plaintiff contends that this correspondence does not state the actual facts at all; that in truth he was peremptorily discharged, and that the foregoing correspondence was indulged in merely “to save his face,” or, as he explains,

“I thought that was the most graceful way. I was discharged, and I thought that was the most graceful way out of it. It is usual, when a man is discharged, to ask for his resignation; that is the most graceful way, of course.”

The letter of resignation, written and mailed by the plaintiff, and the written reply of defendant, accepting the same, taken together, constitute a contract, which, upon its face, is valid and binding upon

the parties. The plaintiff admits the execution of these writings, which are perfectly clear and free from ambiguity, but insists it was a compulsory resignation.

1, 2. In other words, although his reply contains no plea other than a denial, he offers evidence which admits the execution of a written contract and seeks to avoid its legal effect. It is elementary that, in the absence of a proper pleading, such evidence in avoidance cannot be considered. But, even if there were a proper plea in confession and avoidance, we think the evidence submitted totally fails to establish any ground for escaping the legal effect of the written resignation and acceptance. While there is some conflict in the authorities upon this subject, we think the better reasoning supports the conclusion reached in *Wharton v. Christie*, 53 N. J. Law, 607 (23 Atl. 258), and *Merrill v. Wakefield Rattan Co.*, 1 App. Div. 118 (37 N. Y. Supp. 64). The motion for a judgment of nonsuit should have been allowed.

3. Regarding the first cause of action, defendant's first contention is that there is a fatal variance between the contract as alleged in the complaint and that proven. The complaint avers that in the month of February, 1916, plaintiff was employed as manager of defendant's business, at a fixed salary of \$250 per month, and was to receive, at the end of the year, ten per cent of the profits earned during the year, after deducting therefrom an amount equal to ten per cent of the capital stock. The evidence of the plaintiff is to the effect that in February he was employed as manager at a salary of \$250 per month, and that in March it was agreed that he should have, in addition to such salary, ten per cent of the profits earned during the year, after deducting ten per cent of the capital stock. Upon the subject of variance

between allegations and proofs, Section 97, L. O. L., says:

“No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.”

In the present case, there is no contention upon the part of the defendant, that there was any different agreement as to profit sharing, and a difference of a few days in time between making the original contract and the subsequent modification cannot have misled defendant in making its defense, which was based upon the contention that there was never any agreement of any sort upon that subject during that year.

4. It is next urged that the court erred in refusing defendant's request for the following instruction to the jury:

“If you find from the evidence that defendant contracted with plaintiff to pay plaintiff, in addition to his salary, ten per cent of the profits for 1916, after deducting ten per cent on the capital stock, then it is for you to determine from the evidence whether profits were made in the year 1916, and if so, how much. It is for you to determine whether profits, within the meaning of such contract, included an increase in the aggregate amount or value of merchandise and the amount of uncollected bills, or whether, on the other hand, such profits comprised only gains realized in money, and available for distribution.”

The vice of this instruction lies in the fact that it leaves the question of what constitutes profits to be determined by the jury. There is no evidence in the record tending to show that, if there was any profit-sharing agreement for the year 1916, there was any

understanding between the parties as to what should be the meaning of the term, and therefore the interpretation of the contract was exclusively a matter for the court. Upon this subject the court advised the jury as follows:

“On the proposition as to whether or not profits were earned during the year, the court will instruct you that profits in the ordinary business acceptation of the term, means the earning or increased value of the assets of the business over and above the cost price of the goods that have been handled during the period, plus the cost and expenses of operation or overhead charges, as it is called, and plus the cost of handling the financial operations of the business. So that, if in that connection you find that at the expiration of the period covered in the first cause of action, that there was disclosed in the annual statement or annual auditor’s report that there was an accumulation or addition to the value of the assets of the business over that at the beginning of the year, in excess of ten per cent of the capital stock of the corporation, then I instruct you that that additional amount will be in the ordinary meaning of the term profits, whether it be in cash, notes and accounts, or merchandise, or any other assets of the corporation. But I will also instruct you that it must be something beyond the mere natural advance in the price of the goods upon the shelves caused by a changed condition in the market. It must be an accumulation of earnings, an addition to the value of the assets of the corporation, over and above the cost of the goods and the costs and expenses of the operations of the business during the period, that comes about as the result of handling the operations of the business through the methods of industry and industrial enterprise applied to the general management of the business. The mere increase of the value of the goods upon the shelves over and above what they were at the beginning of the year should not be considered as profits. That is only an element which might enter into the question of profits,

but all earnings and additions which are merely attributable to that cause cannot be considered profits, so as to enable the plaintiff to claim compensation upon it in excess of the ten per cent of the capital stock of the corporation.”

This instruction is fully as favorable as the defendant could ask.

5. Defendant further insists that, if this court shall find it necessary to reverse the judgment as to the second cause of action, it must necessarily reverse it as to the first cause of action also, for the reason that the verdict of the jury is for a single sum, and that the amount allowed upon each of the two counts cannot be segregated. The verdict reads thus:

“We, the jury impaneled and sworn to try the above-entitled cause, find our verdict in favor of the plaintiff, and fix and determine the amount to be recovered by plaintiff from defendant at the sum of \$4,450.”

An examination of the record discloses that the complaint alleges, and the evidence of the plaintiff tends to prove, that upon the first cause of action, ten per cent of the profits, computed after deducting from the total profits ten per cent of the capital stock, amounts to \$2,700. Upon the second cause of action the court withdrew the question of profit-sharing from the consideration of the jury, submitting to them only the question of damages incurred by the loss of salary for the remainder of the term after discharge, which the jury evidently computed at the fixed sum of \$350 per month for the remaining five months of the year, amounting to \$1,750. These two sums aggregate the exact sum specified in the verdict, and leave us without any doubt as to the fact that the jury intended to allow plaintiff the \$2,700 demanded by him in the first count of his com-

plaint. It is true that at one time the plaintiff testified that his August salary had not been paid, and later, upon cross-examination, admitted that during the month of July he had overdrawn his account to an extent which would fully pay his August salary, leaving but four months' salary still unpaid; but an examination clearly shows that this evidence was overlooked or disregarded by the jury. Eliminating, therefore, all that the jury could possibly have awarded plaintiff upon the second count, there remains the sum of \$2,700, the exact amount of plaintiff's claim upon the first count, and it is easily and safely to be segregated from the lump sum named in the verdict.

The cases cited by defendant in support of its contention upon this point, all base their conclusion upon the fact that the state of the record is such as to render a severing of the two elements of the verdict impossible, except in the cause of *Little Rock & Ft. Smith R. R. Co. v. Perry*, 37 Ark. 164, in which there is nothing to indicate the amount of the verdict, or what difficulties were presented in the interpretation of the verdict. All that is said regarding the matter is:

“As to the second count in the complaint, no error is claimed, but the judgment, being *solido*, must be reversed.”

We conclude that, as to the first cause of action, the judgment should be affirmed. As to the second cause of action, the case will be remanded, with directions to enter a judgment of nonsuit.

AFFIRMED IN PART. REVERSED IN PART.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

Submitted on brief June 17, reversed July 6, 1920.

COLE v. PORTLAND.

(190 Pac. 720.)

Municipal Corporations—Trial of Policeman—Executive Board— Civil Service Commission—Charter.

1. It is not necessary that a sergeant of police, tried for misconduct, should be arraigned and required to plead before the executive board and the civil service commission, where neither the charter nor rules make any such requirements, since such proceedings are more or less informal and are left somewhat to the discretion of the commissioners.

Evidence—Presumption—Executive Board—Civil Service Commission—Good Faith.

2. It must be assumed that the executive board of a city and its civil service commission acted in good faith for the best interests of the police force and of the public in removing a police officer.

Municipal Corporations—Review—Dismissal of Policeman—Evidence—Sufficiency—Findings.

3. On writ of review as to sufficiency of cause to justify dismissal of police officer by executive board, which was confirmed by civil service commission, where there is any evidence whatever to sustain the findings of the board and commission, the reviewing court cannot inquire into and pass on the facts.

From Multnomah: GEORGE N. DAVIS, Judge.

In Banc.

This proceeding is a writ of review to bring up the proceedings of the board of civil service commissioners of the City of Portland, Oregon, confirming and refusing to set aside the action of the executive board of that city in discharging the plaintiff, who was a member of the police force thereof. The case is an old one, and has been pending on appeal for a long time. There is no brief or appearance of any kind on behalf of the plaintiff and respondent.

The plaintiff was a sergeant in the police force of Portland in the early part of the year 1912. It appears from his petition for a writ of review that

charges were filed against him before the executive board by A. G. Rushlight, who was then mayor of the city. Plaintiff appeared in answer to the charges and a trial was had before the committee on police, and evidence was introduced tending to show that the plaintiff had violated the rules governing the police force by going to the mayor over the head of the chief of police in the matter of his transfer from one district to another, and that immoral soliciting had been more or less carried on in his district, without any arrest being made by him.

The police committee sustained the charges, and recommended his dismissal from the force, and such dismissal and discharge was ordered by the executive board. Thereafter the plaintiff appeared before the civil service commission and asked for reinstatement, and after hearing the case and receiving evidence *pro* and *con*, the dismissal by the executive board was sustained.

The evidence that was taken before the police committee of the executive board appears in the return, but the evidence before the civil service commission does not appear. The members of the executive board are not made defendants in the proceeding, individually or as a body.

After the civil service commission had sustained the dismissal of the plaintiff, he applied to the Circuit Court for Multnomah County for a writ of review, alleging:

“That said dismissal was unlawful and without cause, for the reason that the petitioner herein was not arraigned and given an opportunity to plead to the charges made against him; that the evidence was erroneously construed; that the charges were erroneously construed; that there was error in rendering the decision that the order of removal should be sus-

tained; that there was error on the part of said Civil Service Commission in dismissing said Cole from said Police Department; that there was error in admission of the testimony on the hearing of the trial of this petitioner; that there was no testimony authorizing the dismissal of this petitioner from the Police Department; that error was committed in allowing A. G. Rushlight, as Mayor, to act as accuser, witness, and a member of the Civil Service Commission and Executive Board which acted as the court and judges in the matter of the written charges preferred against E. W. Cole, petitioner herein.

After the hearing of the writ of review in the Circuit Court there was an order setting aside the dismissal of the plaintiff by the civil service commission and remanding the cause to said commission for a new trial. From this order the defendants appealed to this court. **REVERSED.**

For appellants there was a brief submitted over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. Lyman E. Latourette*, Deputy City Attorney.

For respondent *Messrs. Stott & Collier* and *Mr. H. H. Northrup*, appeared in the Circuit Court.

BENNETT, J.—We are of the opinion that there was no error on the part of the executive board and civil service commission which can be revised in this review proceeding.

1. It is true that the record does not show that the plaintiff was arraigned or required to plead at his trial before the executive board and civil service commission. But the charter of the city does not require any such arraignment or plea, and at the time these proceedings were commenced before the executive

board, there were no rules requiring anything of the kind.

2. The plaintiff appeared and had ample opportunity to, and did in fact, answer the charges before the executive board, and the proceeding before the civil service commission was initiated by him. Such proceedings are, in the nature of things, more or less informal, and something must be left to the wise discretion of the board of commissioners. It must be assumed, in the first instance, that the executive board and the civil service commission acted in good faith, and for the best interests of the police force and of the public.

It is urged that the mayor who filed the charges also sat as a member of the executive board, and a member of the commission at the time of the trial. Even if we assume that the fact that he had filed the charges against the plaintiff disqualified him from acting as a member of the board or commission while the matter was before them, it does not sufficiently appear that he participated in the trial to justify the court in reviewing the proceedings upon that ground. Indeed, his own affidavit and the affidavit of another of the commissioners show that he did not, and these affidavits are not disputed in any way.

3. In order to review the finding of the commission as to the sufficiency of the cause to justify the dismissal of the plaintiff as a police officer, it would be necessary for this court to pass upon a question of fact. There seems to have been a trial of the facts before the police committee, and another trial before the civil service commission, in both of which trials there was a finding against the plaintiff. Under the circumstances, the courts would not be justified in interfering with the result of these trials.

It is well settled that upon a review the court cannot inquire into and pass upon the facts, when there is any evidence whatever to sustain the findings of the tribunal sought to be reviewed: *Poppleton v. Yamhill County*, 8 Or. 337, 340; *Smith v. Portland*, 25 Or. 297, 301 (35 Pac. 665); *Oregon Coal Co. v. Coos Co.*, 30 Or. 308, 310 (47 Pac. 851); *Garnsey v. County Court*, 33 Or. 201 (54 Pac. 539, 1089); *Roethler v. Cummings*, 84 Or. 442, 447 (165 Pac. 355).

In *Smith v. Portland*, 25 Or. 297, 301 (35 Pac. 665), Mr. Justice MOORE, delivering the opinion of the court and quoting from the previous decision, said:

“The authorities * * fully sustain the position that the writ of review only brings up the record of the inferior court, and that the superior court, upon review, tries the cause only by the record, and only as to questions of jurisdiction, and as to error in proceeding. It will not on review try questions of fact.”

The judgment of the Circuit Court must be reversed, and the finding and decision of the civil service commission affirmed. REVERSED.

Argued June 11, affirmed as modified July 6, 1920.

MEDFORD IRR. DIST. v. HILL.

(190 Pac. 957.)

Waters—Irrigation District—Organization—Proceedings for Confirmation.

1. In proceedings for the confirmation of the organization of an irrigation district and the issuance of its bonds, which are in the nature of proceedings *in rem*, the Supreme Court on appeal from a decree of confirmation must examine every question presented by the record, whether discussed in the briefs or not.

Waters—Irrigation District—Confirm Organization—Nonappearing Parties—Notice.

2. In proceedings to confirm the organization of an irrigation district and the issuance of its bonds, neither the Circuit Court nor the Supreme Court have jurisdiction to enter a decree binding on land owners who did not appear, where the hearing was held before the expiration of ten days after the last publication of the notice, contrary to Laws of 1917, page 773, Section 41, subdivisions "a," "d."

Waters—Irrigation District—Confirmation—Appearance—Jurisdiction of Court.

3. Though the statutory notice for proceedings for the confirmation of an irrigation district and the issuance of its bonds was not given, the court can determine the legality of the district and the bonds as against the objections of a land owner who appeared and answered.

Waters—Irrigation District Bond Election—Duty of Board of Directors.

4. Under Acts of 1917, page 754, Section 19, authorizing election for the issuance of irrigation district bonds for any purpose, the board of directors, in calling the election for a bond issue, must specify in a general way the purpose for which the bonds are to be sold, and cannot, after the election, abandon the purpose stated entirely and sell the bonds to finance a totally different plan.

Statutes—Irrigation Act of Another State—Notice for Election—Preclude Adoption of Construction.

5. Where the irrigation district act of another state authorized an election for the issuance of district bonds in the amount determined, while the Oregon statute requires an election for the issuance of bonds for any purpose, the legislature cannot be held to have adopted a construction previously placed on the act of the other state as not requiring the purpose of the bonds to be stated in the call for election.

Waters—Irrigation District Bond Election—Notice—Necessity for Stating Purpose.

6. The change from the Irrigation District Act of 1911 requiring submission at election of the question whether the bonds required for the project previously determined shall be issued to that of Acts of 1917, page 754, Section 19, requiring an election for issuance of bonds for any purpose, does not indicate an intention to abolish the necessity of stating the purpose of the bonds in the call for the election.

Waters—Irrigation District Bonds—For What Purpose to be Used—Notice to State General Plan.

7. In stating the purpose for which irrigation district bonds are to be issued, it is not necessary to state more than a general plan, and such plan may be modified or changed in particulars after the bonds are authorized, but cannot be completely abandoned and another plan adopted.

Waters—Irrigation District—Insufficient Resolution—Bonds—Invalid Election.

8. Where the resolution of the board of directors of an irrigation district adopted a particular project in one paragraph, and in the next paragraph called an election to authorize a bond issue, the sale of bonds authorized at that election to construct a totally different project from that adopted is invalid, whether the resolution be construed as calling the election to issue bonds for that project or as not stating the purpose of the bond as required by statute.

Waters—Irrigation Districts—Lands may be Eliminated—Statutory Procedure.

9. Lands can be eliminated from an irrigation district after its organization over the objection of other land owners in the district only by strictly following the statutory procedure therefor, including the publication of notice; a stipulation between the district and the owners of the land to be eliminated cannot authorize the elimination of the land as against those not parties thereto.

[As to lands which may be included in irrigation district, see note in *Ann. Cas.* 1916A, 1222.]

From Jackson: FRANK M. CALKINS, Judge.

In Banc.

This is a proceeding brought in the Circuit Court of the state of Oregon for Jackson County, to confirm the creation and organization of an irrigation district, and the election and proceedings authorizing the issue and sale of the bonds of said district in the sum of one million five hundred thousand (\$1,500,000) dollars, for irrigation purposes.

According to the petition for the original organization of the district, and the order of the County Court creating the same, the district was to comprise 18,500 acres of land.

An election was called and the district was organized and officers elected. After the organization the board of directors met and adopted a project, designated as the "Big Butte Project," for the obtaining of water to irrigate the district, and directed that bonds should be issued in the sum of fifteen hundred thousand (\$1,500,000) dollars, for the construction and installation of a system for irrigating the dis-

trict, and to provide for the payment of the first year's interest on the bonds, and calling an election to determine whether or not the bonds should be issued. At the election the result was favorable to the issuance of the bonds by a small majority.

There is some indefiniteness and uncertainty as to whether the order for a bond election made by the board of directors of the district was tied up indefinitely by such order to the Big Butte Project. The resolution adopting that particular project, and the resolution calling for the bond election, were separately stated, but they seem to have been offered as one resolution and acted upon together by the same vote and proceeding.

Thereafter this proceeding was brought in the Circuit Court to confirm the proceedings before the County Court, the action of the board of directors, and the proposed sale of bonds.

Certain of the land owners in the district, and among others the defendant Hill, appeared and contested the proceedings for confirmation, and some of them asked that their land be eliminated from the district, alleging divers grounds therefor.

Pending the final decision upon this confirmation proceeding, the directors concluded that the original project, designated as the "Big Butte Project," was not feasible, and rescinded the order adopting that project, and adopted an entirely different one, which is known as the "Little Butte Project."

It seems to be conceded that the "Little Butte Project" would not furnish water sufficient to irrigate the whole eighteen thousand five hundred (18,500) acres included in the original boundaries, and the directors concluded to permit all of those who were contesting the proceeding in the Circuit Court to

have their lands eliminated from the district, and proceedings were had to that effect.

Just how this result was brought about does not seem to fully appear from the record, but it seems that some of the land owners, holding land to the amount of something over eight thousand (8,000) acres, had appealed to the Supreme Court from a decision of the Circuit Court, refusing to eliminate their lands from the district, and upon that appeal to the Supreme Court there was a stipulation between such parties and the board of directors that their property should be eliminated, and upon such stipulation a decree of this court was so ordered.

The facts as to the change of the project and the elimination, and consequent reduction of the irrigation district to about ten thousand (10,000) acres, does not appear from the petition of the board of directors to have such proceedings confirmed; but the defendant, Hill, who is now the contesting party, appeared in the Circuit Court and filed an answer setting up such proceedings, and making the same the basis of an objection to any order confirming the sale of the bonds of the district.

There was a decree of the Circuit Court sustaining the proceedings and validating the issuance of the bonds, and from this decree the defendant appeals to this court. AFFIRMED AS MODIFIED.

For appellants there was a brief and an oral argument by *Mr. Rawles Moore*.

For respondents there was a brief and an oral argument by *Mr. Lincoln McCormack*.

BENNETT, J.—This proceeding is in the nature of a friendly suit to test the legality of the organiza-

tion of the district in question, and the regularity of the proceedings by which the bonds were authorized. Nevertheless, the matter has been presented upon both sides with the utmost good faith and with great earnestness and ability.

1. The case is a very important one, not only on account of the very large amount of bonds which are involved in this particular proceeding, and the importance of this particular irrigation project to the development of the country in which it is situated; but because it will also establish a rule in relation to the proceedings to authorize the creation of other irrigation districts, and the issuance of bonds for such irrigation projects.

The proceeding is in the nature of a proceeding *in rem*, and in view of its character and importance we think, before decreeing the validity of these bonds, that it would be and is our duty to examine every question presented by the record, whether discussed in the briefs or not.

2. At the outset of the case we are met with the contention on behalf of the defendants, that the court has no jurisdiction to establish the validity of these proceedings, or declare the validity of the bonds, because, as contended, the notice for the hearing in the Circuit Court was not published in accordance with the provisions of the act authorizing the proceedings.

Subdivision "a" of Section 41, Chapter 357, Laws of 1917, authorizing proceedings of this kind, provides that after the petition for the confirmation shall have been filed by the board of directors—

"The court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published for

three successive weeks in a newspaper published in the county where the office of the district is situated. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may on or before the day fixed for the hearing of said petition, demur to or answer said petition."

Subdivision "d" further provides:

"The board of directors may, within the time hereinafter limited, after the order of the county court declaring the organization of any irrigation district hereunder, or declaring the result of any election hereunder, or after the order of the board of directors of such irrigation district including or excluding any lands in or from said district or declaring the result of any election, general or special, herein provided for, or after any order of such board of directors levying any assessment, general or special, or ordering the issue of any bonds for any purpose hereunder, or after the order determining any bond issue or providing for the same, or after such bond issue, bring a proceeding in the Circuit Court of the county in which the district, or the larger portion thereof, is situated for the purpose of determining the validity of any of the acts or things in this section above enumerated. Said proceeding shall be a proceeding in the nature of a proceeding *in rem*, and the practice and procedure therein shall follow the practice and procedure of suits in equity so far as the same shall be consistent with the determination sought to be obtained except as herein provided.

"Jurisdiction of the said irrigation district, of each and all of the freeholders, assessment payers and legal voters therein shall be obtained by the publication of notice directed to said district and to 'all freeholders, legal voters, and assessment payers within said district' without naming such freeholders, legal voters, and assessment payers individually. Such notice shall be served on all parties in interest by

publication thereof for at least once a week for three successive weeks in some newspaper of general circulation published in the county where said proceeding is pending; and jurisdiction shall be complete *within ten days after the full publication of said notice as herein provided.*"

The notice in this case was dated the sixteenth day of January, 1919, and the time of the hearing, as set therein, was the eighth day of February, 1919. It was published in the "Medford Mail Tribune," and the affidavit of publication states that—

"It was published in the regular and entire issue of said newspaper, once each day for three successive weeks; the first publication thereof having been made on the 17th day of January, 1919, and the last publication thereof having been made on the 7th day of February, 1919."

So it will be seen that there was no ten days after the last publication of the three weeks of notice, as required by subdivision "d," section 41, Chapter 357, Laws of 1917, and if that subdivision applies the publication was not sufficient.

The provisions of Section 41, which we have already quoted, are not very definite and certain. There seems to be a duplication between the general provisions and subdivision "a," on the one hand, and subdivision "d," on the other. We think, however, that taking the legislative act as a whole and construing it by its four corners, as we must do, the notice should be published three weeks, and the last publication should be at least ten days before the date of the hearing, in order to give the court jurisdiction over nonappearing land owners within the boundaries of the district, in a confirmation proceeding of this kind. It follows that neither the Circuit Court nor this court would have jurisdiction to enter

a decree binding upon the land owners who are not appearing.

3. However, the defendant Hill has appeared and answered in the cause, which is sufficient to give jurisdiction as between him and the board of directors, who are petitioners for the confirmation.

In order, therefore, that there may be no unnecessary delay, we will proceed to decide the question in issue, as between the petitioners and the defendant Hill.

There is no defect in the original proceeding for the organization of the district, which has been pointed out, or which we have been able to discover, which would be fatal thereto, under the previous decisions of this court.

The constitutionality of this act has been frequently upheld in this state: *Links v. Anderson*, 86 Or. 508 (168 Pac. 605, 1182); *Gard v. Peck*, 91 Or. 33 (178 Pac. 186); *Hanley Co. v. Harney Valley Irr. Dist.*, 93 Or. 78 (180 Pac. 724, 182 Pac. 559).

The constitutionality of a similar act in California has been many times upheld by the Supreme Court of that state, and finally by the Supreme Court of the United States in *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112 (41 L. Ed. 369, 17 Sup. Ct. Rep. 56, see, also, Rose's U. S. Notes).

We think, therefore, there was no error in the decree of the Circuit Court, in so far as it confirmed the organization of the district, and the proceedings in relation thereto.

As to that portion of the decree of the Circuit Court confirming the validity of the bonds to be issued, it appears that the original proposition, at the time the bonds were voted, was to bring in the water of a certain stream, known as Big Butte Creek,

at an estimated cost of fifteen hundred thousand (\$1,500,000) dollars, and the projected district at that time included about 18,500 acres, so that the estimated cost was \$75 per acre.

It is alleged in the answer of defendant Hill, and expressly admitted in the petitioner's reply, that this project has been entirely abandoned, and that since the election upon the bonds the board of directors has rescinded the action adopting the same and substituted another project to bring in the waters of Little Butte Creek, at a cost of twelve hundred fifty thousand (\$1,250,000) dollars, and has eliminated about eight thousand (8,000) acres of land, so the cost would be about \$125 per acre, instead of \$75, and it is admitted and conceded in the pleadings that the board of directors are now attempting to sell the bonds for the purpose of the new project, which was not considered at all at the time the bonds were voted, and which is an entirely different proposition from the one the people had in view at the time the bonds were so authorized.

We think we would not be justified in confirming the sale of the bonds for this new and entirely different purpose, without a new election, giving the land owners who are now to be included in the district an opportunity to vote thereon.

4. Section 19 of the Act of 1917 (Chap. 357, p. 754), provides:

“Upon order of the directors duly entered, an election shall be held to determine whether bonds in any amount the board may deem necessary shall be issued *for any purpose* necessary or convenient in carrying out the provisions of this Act, including the refunding of outstanding bonds, or whether the right to enter into an obligation or contract with the United States shall be authorized. * * ”

We think the words "for any purpose," italicized above, together with the clauses following, indicate an intention upon the part of the legislature, that there should be some general plan or purpose adopted for the bringing in of water before a bond election, which purpose should be expressed in the order of the directors authorizing the election, and upon which the land owners can vote intelligently as to whether or not the bonds for that purpose shall be issued.

If this were not true, bonds could be issued and sold without any project whatever having been selected or being in view, and upon the mere chance that some feasible proposition for obtaining water could be discovered and decided upon at some time in the future.

We do not think an act of this kind, authorizing the burdening of large agricultural districts with great sums of indebtedness, approximating the entire value of the lands in the district, and to be enforced oftentimes against the will of a portion of the land owners, should be so loosely construed. Such enterprises are full of risk and danger at the best, and must necessarily be disastrous to the entire district if they fail.

The California act, generally known as the "Wright Act," passed in 1887 (Stats. 1887, p. 290), and upon which other Irrigation District Acts have been more or less modeled, was loosely drawn and was, at first, still more loosely construed by the courts.

Mr. Chandler, in his work on Western Water Law, page 143, sums up the final outcome of the 25 companies that issued bonds under this early law, and the decisions so loosely construing the same, as follows:

“Of the 25 that issued bonds, 7 have made some kind of a settlement and have no outstanding obligations as districts at this time. Two have made settlement, but still have small outstanding indebtedness that either has been declared illegal or cannot be found. Four have made settlement by exchanging new for old bonds and are now active, and with the exception of one, whose reorganization is not yet complete and which therefore cannot be judged, are active and successful and can undoubtedly be counted on to pay both bonds and interest as due. Five have compromise settlements pending. Seven have apparently been totally abandoned, with no plan of settlement as yet seriously taken up.

“Where settlements have been made, they have been so different that it is hard to explain them with sufficient brevity for the purpose of this paper, and reference is therefore made to the table that will be submitted. The lowest basis of settlement has been 30 cents on the dollar, and the highest between 80 cents and 90 cents. Several compromised at 50 cents.”

Such results not only bring catastrophe and financial ruin to the land owners within the irrigation districts, and to the bond buyers who are compelled to take a heavy loss on each dollar invested in the bonds but they discredit irrigation bonds generally and make it difficult, and sometimes impossible, to market the same to finance really meritorious undertakings.

In construing our own law we cannot suppose that the legislature intended to authorize the issue and sale of bonds until some definite plan for obtaining water has been adopted, or that it intended that bonds might be issued and sold, and the money left in the hands of the directors, or in the treasury of the company, for an indefinite time which might reach into months or years.

If the order of the board of directors, calling the election for the bonds, must adopt and specify some particular purpose or project for which the bonds are to be issued, as we hold, it follows logically, as a matter of course, that the directors could not entirely abandon that project, upon which the land owners had voted the bonds, and issue bonds for the purpose of developing some other and entirely different project, entirely foreign to the one adopted at the time of the election.

We hold, therefore, that under this statute the board of directors in calling the election must specify in a general way the project upon which the bonds are to be sold, and, having adopted that project, they cannot entirely abandon it and sell bonds to finance some other and totally different plan than the one voted on.

It is urged on behalf of respondent that our statute is a re-enactment of the Wright statute in California, adopted in 1887, and to which we have already referred, and that before the passage of our law the Supreme Court of California had construed that act and held that it was unnecessary for the resolution of the board of directors to point out or specify any particular project in calling the election upon the bonds, and that in adopting the California law we have adopted it as construed by the California court, under the well-known rule that, where a statute copied from another state is adopted by our legislature, it adopts with it any construction of the legislation, which had been given by the courts of the state, from which the same was adopted.

There are two reasons why this rule does not compel the adoption of the construction contended for on behalf of the board of directors, in this case.

5. In the first place, Section 19 of our statute, already quoted, is not copied from the California statute. Section 15 of the Wright Act, which was the section controlling the issuance of bonds, was as follows:

“For the purpose of constructing necessary irrigating canals and works and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this Act, the Board of Directors of any such district must, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised, and shall immediately thereupon call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this Act, the question whether or not the bonds of said district shall be issued in the amount so determined. * * ”

By comparing this section with Section 19 of our own act, already quoted, it will be seen at once that there is a very substantial difference in the wording of the two sections, so much so that the rule invoked concerning statutes, copied literally from the statutes of another state, cannot apply. Neither do we think that the California decisions, taken as a whole, support the construction of the Wright Act, urged by the respondent herein.

It is true that in *Modesto Irr. Co. v. Tregoe*, 88 Cal. 334 (26 Pac. 237), one department of the Supreme Court of California, did use the language quoted in the brief of the respondent, and among other things, said:

“The authority to issue bonds is wholly independent of the source of supply of water or any plans for obtaining it.”

Which is the language upon which particular stress is placed in the brief of respondent in this case. But,

when the same question came before the court in banc, in *Cullen v. Glendora Water Co.*, 113 Cal. 503 (45 Pac. 822), the court held directly that it was necessary that a definite plan *should* be adopted before the election upon the bonds could be called, and disapproved the previous language relied upon by the respondent in this case, saying:

“Counsel for respondent contends that this question has already been decided in their favor in the case of *Board v. Tregea*, 88 Cal. 357 (26 Pac. 237), where the following language was used by the court: ‘The authority to issue bonds is wholly independent of the source of supply of water, or any plans for obtaining it.’ This language was not very happily chosen, and taken in its largest sense, for universal application, is misleading.”

It is true that the court in the latter case attempts to reconcile its decision with the decision in the Tregea case, upon the ground that in the Tregea case there was only a modification of the previous plan. But we think the latter case cuts all the heart out of the former, and leaves nothing which could logically support the construction contended for by the respondent herein, even if the statutes were alike.

In *Willow Spring Irr. Dist. v. Wilson*, 74 Neb. 269, 272 (104 N. W. 165, 167), the Supreme Court of Nebraska, in construing a statute identical with the Wright Act, held that there must be definite plans prepared by an engineer, in order to sustain an election authorizing the issuance and sale of bonds, saying:

“The object of the statute under consideration was undoubtedly to allow the people of the district to examine and know the plan of the proposed improvement, and the estimated cost thereof, before they incurred the burden of the indebtedness necessary to complete the proposed works.”

6. It is argued that the change from the language of our act of 1911 (Laws of 1911, page 378), to that of the act of 1917 supports respondents' construction, but we think there is nothing in the change which indicates an intention on the part of the legislature to authorize the directors to call a bond election, without adopting any plan or project for the bringing in of water. On the contrary, we think that, while the language of the act of 1911 was more explicit in that regard than the language of the later act, yet the later act, when fairly construed, still provides that the bond election must only be called with reference to some general purpose or project, and cannot be left entirely up in the air, with power to the district to issue and sell bonds, without reference to any purpose or plans and without ascertaining whether there is any source from which water for irrigation can be obtained. If any such a revolutionary change had been intended by the legislature, we think it would have indicated it in plain words, and the fact that it did not say so, but, on the contrary limited such authorization of bonds to "any purpose" selected by the order of the directors, makes some definite purpose just as necessary to the issuance of bonds as it was under the old act.

7. We must not be understood as holding that every detail of a project must be set forth in the order of the court calling the election, or that anything more than a general plan or project is required. Neither are we holding that the plan or project adopted cannot be modified or changed in any particular, or that such plans cannot be added to or developed if that shall become necessary.

8. In this case the action of the board of directors, calling the election, was by resolution which appears to have been as follows:

“Resolved that for the purpose of providing a system for the irrigation of the district this board hereby adopts the project known as the Big Butte Project, in accordance with the report, specifications, and estimates submitted to the board by its engineers.

“Resolved that for the purpose of defraying the expense of the construction and installation of a system for irrigating the district, and to provide for the payment of the first year’s interest on bonds, bonds be issued by the district to the amount of \$1,500,000.

* *

“Resolved that an election shall be held on the 28th day of September, 1918, to determine whether bonds to the amount of \$1,500,000, shall be issued for the purpose of constructing and installing a system for the irrigation of the District, in accordance with the provisions of Chapter 357 of the General Laws of Oregon for 1917.”

Whether this resolution is construed as declaring a definite project upon which the authorization of bonds was submitted to the voters, or not the result is equally fatal to the authorization of the bonds. If its intent was not to adopt any particular project for the bringing in of water, then it was not sufficient in the first instance, as before shown; and, if it did tie the election up to the particular project, then the board of directors had no authority to abandon the same and proceed to sell bonds for an entirely different project from the one upon which the people had voted.

It follows that the proceedings of the district in the matter of its organization and the election of its officers be confirmed; but the proposed action of the board of directors in selling bonds for a different project than the one voted upon is not confirmed, but is held to be illegal.

9. It is not necessary to decide, and we do not find in the record sufficient to justify us in deciding, whether the action of the board of directors in eliminating the 8,500 acres from the irrigation district was valid and effectual. There is no doubt that the act of the legislature provides ample authority for such elimination, if the proper steps are taken and the proper notice given. But it is necessary that proper notice shall be given by publication, as provided by the act, and that every step which the act requires for such elimination must be carefully followed to make the elimination valid.

No stipulation of the parties who appeared in the cause, and no judgment based upon such stipulation, as between them, could be binding upon the other land owners in the district, who did not appear, if no such notice, as required by law, was given.

The proceedings in relation to the attempted elimination are not presented by the petition for confirmation, and we find nothing in the record upon which we can decide whether the requisite notice was given or not. If such notice was given, and the law was complied with in every step leading up to such elimination, then no one could complain since every land owner had received notice and an opportunity to be heard, if he desired to object. But if these notices were not given, as required by the statute, then it would be better to take steps to have such eliminations as are necessary carefully made, in accordance with the statute, before another election is called.

The decree of the court below is affirmed as to that portion confirming the proceedings of the County Court and of the district and board of directors organizing the district and electing its officers, and modified and reversed as to that portion confirming

and authorizing the sale of the bonds for the purpose of constructing and developing the Little Butte Creek project.

AFFIRMED AS MODIFIED.

BURNETT and BENSON, JJ., did not sit in this case.

Argued June 2, modified July 6, 1920.

JAMES v. WARD.*

(190 Pac. 1105.)

(See, also, 84 Or. 375, 164 Pac. 370.)

Trial—Action at Law—Answer—Equitable Relief—Statutes.

1. Under Section 390, L. O. L., as amended by Gen. Laws of 1917, page 126, defendant in an action at law setting up in his answer facts entitling him to relief in equity and material to his defense, the case is properly proceeded with as a suit in equity till determination of the issues thus raised.

Vendor and Purchaser—Contract—Rescission—Evidence.

2. Evidence in suit between parties to contract for sale of land held not to show agreement that it should be rescinded if title was not perfected by a certain date.

Appeal and Error—Trial—Findings—Entitled to Weight—Disputed Question of Fact.

3. Opinion of the trial court in an equity case on a disputed question of fact is entitled to great weight because of opportunity had of seeing and hearing the witnesses.

Contracts—Modification—Waiver—Acquiescence.

4. A party to a contract may waive any term intended for his benefit, and this, if agreed to and acquiesced in by the other party, modifies the contract accordingly.

Vendor and Purchaser—Contract—Rescission—Fraud.

5. A purchaser by treating the contract in force and continuing in possession of the premises enjoying the benefits after knowledge of fraudulent representations waives right to rescind on account thereof.

Vendor and Purchaser—Taking Possession by Vendor—Abandonment—Mutual Rescission.

6. The taking possession by vendor of the premises when abandoned by the purchaser does not constitute a mutual rescission of

*On waiver of purchaser's right to rescind contract for purchase of real property, see note in 30 L. R. A. (N. S.) 872. REPORTER.

the contract of sale; this being done that a third person, against whom he was prosecuting a suit to quiet title, should not gain an advantage by entering into possession and to protect the buildings.

Appeal and Error—Foreclosure of Contract—Excessive Attorney's Fee.

7. Allowance of excessive attorney's fee on foreclosure of contract for sale of land is not immaterial, though there be no personal judgment, and purchaser has indicated intention not to reinstate the contract, as conditions may change and he may desire to redeem.

Vendor and Purchaser—Foreclosure of Contract—Attorney's Fees—Amount Due.

8. Attorney's fees decreed in suit to foreclose contract of sale of land should be estimated, not on the full balance of unpaid price, but only on the amount found due, by payment of which, with such attorney's fee, it was decreed the purchaser might reinstate the contract.

From Lane: JOHN S. COKE, Judge.

Department 2.

On April 14, 1913, plaintiff, Frances E. James, acting through her husband, W. F. James, entered into a contract in writing with defendant, George D. Ward, by the terms of which defendant agreed to sell to the plaintiff a tract of land in Lane County, Oregon, consisting of about 640 acres, described in the complaint, for the sum of \$18,000, of which \$1,000 was paid in cash, and 240 acres of land in South Dakota at the agreed price of \$6,000 was taken in part payment therefor, making a total payment of \$7,000 at the date of the contract, and the balance of \$11,000 was to be paid on or before ten years after date, with interest at 7 per cent per annum, payable annually. The vendee was to pay all taxes assessed during the time after January, 1913. There were included in the deal with the Lane County farm horses, cattle and sheep, farm implements, and other personal property variously estimated in value from \$1,000 to \$2,000, all of which personal property was

delivered by defendant to plaintiff with the land. After making the contract plaintiff paid on different dates during the first year \$667.25.

Plaintiff claims that the contract of sale was mutually rescinded by the parties, and brought this action to recover the amount paid thereon. Thereupon the defendant filed an answer in the nature of a cross-complaint in equity seeking to foreclose the contract on account of the default of the plaintiff in the payment of interest and taxes due and unpaid under the contract.

Plaintiff alleges that in July, 1913, plaintiff and defendant entered into a verbal contract by the terms of which the defendant agreed to furnish to plaintiff within a year from the date of the contract an abstract showing clear and perfect title to the land described in the contract; that defendant failed to furnish such abstract at any time. Plaintiff further states that during the winter of 1914 the parties mutually agreed to rescind the contract, and plaintiff surrendered to defendant the possession of the real estate described in the contract. Plaintiff avers that it was mutually understood by and between the parties at the time of signing the contract that the defendant would at once deliver to plaintiff an abstract of title to the Lane County land showing clear title in defendant, and that at the time defendant represented that he had a good title to the land.

Neither the personal property, the abstract of title, nor the South Dakota land was mentioned in the written contract. In May, 1913, plaintiff discovered that the contract failed to provide for an abstract of title to the Lane County land and had some talk with the defendant in regard thereto. It was at this time plaintiff claims defendant agreed that, if he did not

furnish the abstract showing good title within a year, or by the time the next interest would become due, the plaintiff would not be required to take the land, and that he would repay her what she had paid thereon.

The defendant claims that at the time of entering into the contract it was verbally agreed that at the time of the last payment to be made under the contract and when a deed was to be delivered, that he should furnish to plaintiff an abstract of title to the property. The annual interest for the first year came due on April 14, 1914. On August 26th of that year Ward commenced a suit in the Circuit Court for Lane County to foreclose the contract on account of the failure to pay the interest and taxes. A decree of foreclosure was rendered by the trial court, and upon appeal to this court the decree was reversed and the suit was dismissed without prejudice to the rights of either party: See *Ward v. James*, 84 Or. 375, 385 (164 Pac. 370). In the present suit the defendant denies that he agreed to furnish an abstract of title before the interest became due on or before April 14, 1914, or at any time before final payment, or that he agreed to rescind the contract.

It appears that after the execution of the contract plaintiff assigned the same and her interest in the Lane County land and personal property to George R. Rickman and Adaline Rickman, and delivered the possession of the land and personal property to them. They remained in possession thereof until March 20, 1915, when they vacated and abandoned the premises, as plaintiff asserts, on account of the defective title of defendant. Thereupon defendant, Ward, entered into the possession of the land. The personal property was never returned or offered to be returned

to Ward. Part thereof seems to have been kept or dissipated by the Rickmans, and a portion thereof was paid to a real estate broker as commission for making the deal between plaintiff and the Rickmans.

To defendant Ward's further and separate answer in equity, showing that the contract had never been rescinded and seeking to foreclose the same, plaintiff replied, setting up all of the facts that were in her amended complaint, and asking that the answer in equity be dismissed, and the issues be tried to a jury, as in an action at law.

The trial court found that there was no agreement on the part of defendant to furnish an abstract of title until final payment should be made by plaintiff; that there was no agreement on the part of defendant to rescind the contract; and that the sum of \$3,954.12 was then due from plaintiff, Frances E. James, to defendant George D. Ward, upon the contract, together with \$800 attorneys' fees in the suit. The court decreed that the contract be foreclosed—

“Provided that the plaintiff, Frances E. James, shall have a period of six months from the date of this decree to pay into court the amount so found due as aforesaid, together with the attorneys' fees and the costs of this action, with interest thereon, except as to attorneys' fees, at the rate of 7 per cent per annum from the date hereof, and in the event of the payment of such amount the said Frances E. James, plaintiff, shall be entitled to and receive a credit of the sum of six hundred dollars, the rents collected by the defendant.”

And upon failure of plaintiff to pay the amount the contract should be foreclosed and the action at law enjoined. From this decree plaintiff appealed.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery*.

For respondent there was a brief over the names of *Mr. O. H. Foster* and *Messrs Williams & Bean*, with an oral argument by *Mr. John M. Williams*.

BEAN, J.—1. Plaintiff assigns error of the trial court in assuming jurisdiction of this cause in equity and refusing to relegate the parties to the court of law in foreclosing the contract. Error is also predicated in the allowance of \$800 as attorneys' fees. It is first urged by counsel for plaintiff that, "as the plaintiff instituted her action at law first the court erred in compelling her to submit to the jurisdiction of a court of equity."

Section 390, L. O. L., as amended by General Laws of Oregon, 1917, page 126, which enacted a radical change in equity practice in this state, provides among other things that—

"In an action at law where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may set such matter up by answer, without the necessity of filing a complaint on the equity side of the court; and the plaintiff may, by reply, set up equitable matter, not inconsistent with the complaint and constituting a defense to new matter in the answer. Said reply may be filed to an answer containing either legal or equitable defenses. The parties shall have the same rights in such case as if an original bill embodying the defense or seeking the relief prayed for in such answer or reply had been filed. Equitable relief respecting the subject matter of the suit may thus be obtained by answer, and equitable defenses to new matter contained in the answer may thus be asserted by reply. When such an equitable matter is interposed, the proceedings at law shall be stayed and the case shall thereafter proceed

until the determination of the issues thus raised as a suit in equity by which the proceedings at law may be perpetually enjoined or allowed to proceed in accordance with the final decree; or such equitable relief as is proper may be given to either party. If, after determining the equities, as interposed by answer or reply, the case is allowed to proceed at law, the pleadings containing the equitable matter shall be considered withdrawn from the case, and the court shall allow such pleadings in the law action as are now provided for in actions of law. No cause shall be dismissed for having been brought on the wrong side of the court. The plaintiff shall have a right to amend his pleadings to obviate any objection on that account. Testimony taken before the amendment and relevant to the issue in the law actions shall stand with like effect as if the pleadings had been originally in the amended form."

The defendant set up in his answer to the complaint in the action at law facts which entitled him to relief in equity and which were material to his defense. The suit is in the same condition as though under the old statute plaintiff had answered the complaint and filed a complaint in equity in the nature of a cross-bill.

The proceedings are in conformity with the statute as amended. The plaintiff had a right by her reply to set up equitable matters not inconsistent with her complaint constituting a defense to the new matter in the answer. The parties had the same rights in this case as if an original bill seeking the relief prayed for in the answer had been filed. There was no error in the interposition of a court of equity.

2. The case on the merits centers upon the question of whether or not there was a mutual rescission of the contract. Plaintiff and her husband and their minor son testified to the purport that according to

their understanding there was an agreement for a mutual rescission of the contract in case defendant did not perfect his title and furnish an abstract of title on or before April 14, 1914.

There has been no offer on the part of plaintiff to make full payment. Indeed, there has been no tender of the amount due under the terms of the contract. Apparently the defendant, at the time the contract was executed, thought he had good title to the land. It is to be regretted that so important a matter as the abstract of title was omitted from the contract. Whatever the agreement or understanding was at the time of the contract, it seems the parties have gone beyond that. Reliance of plaintiff is placed upon a subsequent agreement. On April 14, 1914, plaintiff with knowledge of the condition of the title of Ward to the land and of the failure of Ward to furnish the abstract by that time and of the alleged false representations of Ward, instead of rescinding the contract or attempting to rescind by a letter of that date which is in evidence called upon Ward to perfect the title. She had obtained an abstract and after calling Ward's attention to the defects in the title used this language in the letter:

"I would therefore request that you take such steps as are necessary to put the title in marketable condition. * * With reference to the interest credits on the contract, I would thank you to give me the credits due on the contract, possibly the best way would be to notify Mr. Wells, your attorney, to make that notation on the contract for you."

Afterward Ward instituted a suit to perfect his title and eliminate the objectionable features raised by the attorney who examined the abstract of title for Mrs. James, and acquired quitclaim deeds from various persons, and at the time of the trial of this

cause it is conceded, as we understand, that Ward had a complete title to the land. The abstract of title and the various deeds are contained in the record as well as the record of the suit to quiet title.

Scrutinizing the testimony carefully, it would seem that Ward desired time to straighten up his title, and that there never was a meeting of the minds of the parties to the effect that, if the title was not completed by April 14, 1914, that the contract should be rescinded. There has been no offer on the part of plaintiff to return the livestock and other personal property which was sold and delivered by defendant to plaintiff.

3. The trial court had the opportunity of seeing the witnesses, and hearing them testify, and its opinion on this disputed question of fact is entitled to great weight. We are constrained to note that there is more conflict in the way in which the parties understood the arrangements, or conversations subsequent to the contract than there is in regard to what was said and done. That Ward was to furnish an abstract of title is not disputed. As to when he was to furnish it according to the subsequent arrangement there is a great chance for a misunderstanding on the part of Mrs. James.

4. One of the parties may waive any terms of the contract which are intended for his benefit, and this, if agreed to or acquiesced in by the other modifies the contract accordingly. Parties to a contract of any kind, whether written or verbal, may at any time rescind or terminate it by their mutual consent or agreement, and either restore each other to the *status quo* or fix their respective rights and liabilities upon such abrogation of the contract. They may release themselves from a contract in the same manner that they may bind themselves by a contract: Black on

Rescission and Cancellation, § 521. It is stated in Section 523 of that work that:

“So long as a contract remains executory, a mutual agreement of the parties to rescind it requires no new or independent consideration, for the release of each of the parties from his duties and obligations under the existing contract is sufficient consideration for his agreement to release the other.”

Authority to the contrary is there noted. If Mrs. James ever had the right to demand of Ward an abstract of title showing a marketable title to the Lane County land prior to the time she requested that he complete his title, she waived that right and acquiesced in Ward taking reasonable time to perfect the record of his title.

5. Plaintiff also seeks to rescind the contract on the ground that Ward falsely represented that he had a good title to the land. The plaintiff and those claiming under her, the Rickmans, remained in possession of the premises and enjoyed the benefits thereof from about the time of the execution of the contract until March 20, 1915, and never during the period after she discovered the alleged defects in the title, which appears to have been prior to April 14, 1914, did she attempt in any way to rescind the contract upon any grounds until she filed an amended answer in the former suit on March 8, 1915, in which they sought to rescind the contract by reason of a defective title.

The general rule is laid down in 39 Cyc., page 1432, subdivision h, as follows:

“Any action on the part of the purchaser treating the contract as in force, when done with a knowledge of facts creating a right to rescind, amounts to a waiver of the right to rescind because of the existence of such facts.”

It is stated in the opinion in the case of *Scott v. Walton*, 32 Or. 460, at page 464 (52 Pac. 180, at page 181), thus:

“A party who has been induced to enter into a contract by fraud, has, upon its discovery, an election of remedies. He may either affirm the contract, and sue for damages, or disaffirm it, and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, and especially his remaining in possession of the property received by him under the contract, and dealing with it as his own, will be evidence of his intention to abide by the contract.”

This is the established rule. Several material questions bearing upon this case were thoroughly discussed by Mr. Justice McCAMANT in the former case, 84 Or. 382 (164 Pac. 370).

6. It is fairly shown in the record that the taking of possession of the property by Ward on March 20, 1915, when it was abandoned by the Rickmans, did not constitute a rescission of the contract. Ward took possession in order that the party against whom he was prosecuting a suit to quiet title would not gain an advantage by entering into possession of the premises and in order to protect the buildings, which had been left with the doors open, and prevent dilapidation of the premises.

Plaintiff has failed to prove an agreement between herself and defendant to restore each other to the *status quo*, or mutually rescind the contract.

7, 8. Plaintiff claims error on account of allowance of attorneys' fees. Defendant claims that as she has signified an intention not to pay the amount found due upon the contract, the amount of attorneys' fees is immaterial; there not being a personal judgment against plaintiff. Conditions may be changed and plaintiff may yet desire to reinstate the contract. It seems the attorneys' fees were estimated upon the balance of the contract, \$11,000 and interest. The court decreed that the plaintiff might reinstate the contract by paying \$3,954.12 together with attorneys' fees, which we think from the testimony should be 10 per cent of \$3,954.12 of the amount found due. Plaintiff should be allowed six months from the time of entering the mandate in this cause in the lower court to pay the amount found due upon the contract by the trial court together with 10 per cent attorneys' fees, with interest on the amount of the decree, excepting the attorneys' fees, at the rate of 6 per cent per annum from January 13, 1919, the date of the original decree. Neither party should recover costs upon this appeal.

The decree of the lower court, modified as suggested, is affirmed. MODIFIED.

HARRIS, JOHNS and BENNETT, JJ., concur.

Argued May 27, affirmed July 6, 1920.

**ENDICOTT, JOHNSON & CO. v. MULTNOMAH
COUNTY.**

(190 Pac. 1109.)

**Taxation—Power is Limited to Persons, Property and Business
Within Territorial Jurisdiction.**

1. The power of taxation though an inherent attribute of sovereignty is limited to the taxation of persons, property and business situated within the territorial jurisdiction of the state imposing the tax.

**Taxation—Personal Property—Follows Owner is Subject to Excep-
tion.**

2. The general rule that personalty follows the owner is invoked to determine the situs of personal property for taxation as a fiction to work out justice, and is not permitted to govern when justice does not demand that it should, and cannot prevail when inconsistent with express provisions of the statute.

Taxation—"Personal Property"—Tangibles and Intangibles.

3. Personal property for purposes of taxation includes intangibles as well as tangibles, so that not only money but promissory notes and accounts are subject to taxation.

**Taxation — Tangible Personalty — Nonresident Owner — Taxable
Where Located.**

4. Tangible personal property may be taxed where it is physically located, even though the owner resides in another jurisdiction.

**Taxation—Bills and Notes—At Owner's Domicile in Another State
not Taxable.**

5. Promissory notes owned by a resident of another state and held by him at his place of residence are not taxable within the state, though executed by state residents, though the paper on which the note was written is considered the note, so that it may be treated as tangible property.

[On right of state to tax evidences of debt belonging to nonresidents, see note in 11 Ann. Cas. 739.]

**Taxation—Bills and Notes—Owner—"Business Situs" of Nonresi-
dent Within State may be Taxed.**

6. Where a nonresident has acquired a business situs within the state, that is, has carried on a business in the state more or less permanent in its nature, the property used in that business, including notes and accounts arising from such business transactions, becomes localized at the place where the business is conducted, and is there taxable.

Taxation—Nonresident Manufacturer, Represented in State Only by Salesman, has no Business Situs.

7. A nonresident manufacturer, whose only agent in the state is a salesman authorized only to take orders, which are filled directly from the factory, and for which payment is made to the manufacturer out of the state, has no business situs within the state, so as to render accounts and notes for sales within the state taxable.

Taxation—Bills and Notes of Nonresident not Taxable as "Personal Property"—Statutes.

8. Section 3551, L. O. L., as amended by Laws of 1907, Chapter 268, making taxable personal property situated or owned within the state, and section 3553, as amended by the same chapter, defining personal property to include debts due from solvent debtors, when construed in the light of their legislative history, do not make taxable notes and accounts due from resident debtors to a nonresident of the state, who has no business situs within the state.

Taxation—Domicile of Owner—Prima Facie Situs of Personalty for Taxation.

9. The domicile of the owner is *prima facie* the situs of personal property for taxation, so that unequivocal words are ordinarily needed in any tax legislation to separate the personal property from the owner's domicile.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

The assessor of Multnomah County made an assessment against Endicott, Johnson & Company for "money, notes and accounts" in the sum of \$5,000, and for "office furniture, library, instruments," in the sum of \$30. The board of equalization for Multnomah County denied an application made by Endicott, Johnson & Company for the cancellation of the assessment, and Endicott, Johnson & Company appealed to the Circuit Court. After a hearing the Circuit Court ordered that the assessment be annulled, and the county appealed to this court.

Endicott, Johnson & Company are manufacturers of shoes, and have their factory and place of business in Endicott, New York. W. H. Ambler is employed by Endicott, Johnson & Company as a traveling

salesman. His territory includes all that part of Oregon which is west of Bend; and he visits merchants in that territory, displays samples, takes orders for shoes, and sends the orders to Endicott, New York. The orders are filled in Endicott, "billed on sixty days' time," and "the merchants remit directly to the house for the merchandise when the bills are due." Ambler maintains an office in the Worcester Block in Portland, and on the door appear the words "Endicott, Johnson & Company, Wholesale Shoes, W. H. Ambler, Agent." The furniture in the office is the personal property of Ambler; and, when asked why he caused the name of Endicott, Johnson & Company to appear on the door in addition to his own, he explained that—

"Endicott, Johnson is much better known than W. H. Ambler; and a merchant looking for the office of Endicott, Johnson & Company would look for their name, not for mine."

Ambler had no authority except to solicit and send orders for goods to Endicott, New York, where they were accepted or rejected, and, if accepted, were filled. Endicott, Johnson & Company do not maintain a branch office, or a place of business, or a warehouse in Oregon. Merchants buying goods remit to Endicott. There are no moneys deposited to the credit of Endicott, Johnson & Company in Oregon. On March 1, 1918, the date as of which the assessment was made, Endicott, Johnson & Company had no property physically located in Oregon. On that date, however, there were unpaid accounts due from Oregon merchants to whom Endicott, Johnson & Company had sold shoes, and possibly Endicott, Johnson & Company also had in their possession at

Endicott, New York, promissory notes given by Oregon merchants for shoes purchased by them.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George Mowry*, Deputy District Attorney.

For respondents there was a brief over the names of *Mr. F. M. Saxton*, *Mr. Sidney Teiser* and *Mr. J. F. Boothe*, with oral arguments by *Mr. Saxton* and *Mr. Teiser*.

HARRIS, J.—The county concedes that the assessment of \$30 against Endicott, Johnson & Company on account of “office furniture, library, instruments,” was properly set aside; but the annulment of the assessment of \$5,000 on account of “money, notes, and accounts” is strenuously resisted. The county also concedes that the company had no money within its jurisdiction. The position of the county is that, inasmuch as Endicott, Johnson & Company had no money in Multnomah County, but did have notes and accounts arising out of sales made to Oregon merchants, it must be presumed that the assessment was not intended to cover money, but that it was designed to embrace only notes and accounts. For the purposes of this case, we shall assume, without deciding, that the word “money” appearing on the assessor’s records may be ignored, and that the assessment was intended to cover, and that it does cover, nothing but notes and accounts.

It affirmatively appears from the evidence that the company had in its possession at Endicott, New York, promissory notes; but it does not clearly appear whether any of these notes were given on ac-

count of sales made in Oregon; and, moreover, the findings of the trial court, although indefinite in this respect, rather indicate that it was the opinion of the Circuit Court that the company did not have any notes signed by Oregon merchants. We shall not attempt to determine what the actual facts are, but we shall assume that the county's contention is correct, and that on March 1, 1918, Endicott, Johnson & Company did "own notes and accounts that were owing to them from residents of Multnomah County," and that these were the notes and accounts covered by the assessment, and that \$5,000 was their aggregate value.

1. The power of taxation, although an inherent attribute of sovereignty, is necessarily limited to subjects within the jurisdiction of the state exercising the power. "These subjects," as stated in *State Tax on Foreign-held Bonds*, 15 Wall. 300 (21 L. Ed. 179), "are persons, property, and business." A state cannot tax a person or property or a business unless it first acquires jurisdiction over such person, property, or business. It is the prerogative of the legislature to decide what persons and what property shall be taxed; but legislation of a given state can be made to operate only upon persons and property within the sphere of its territorial limits. A tax imposed without jurisdiction over either persons or property is void: *St. Louis v. The Ferry Company*, 78 U. S. (11 Wall.) 423 (20 L. Ed. 192, see, also, Rose's U. S. Notes); *Tappan v. Merchants' National Bank*, 19 Wall. 490 (22 L. Ed. 189); *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628 (38 L. Ed. 854, 14 Sup. Ct. Rep. 952); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395 (51 L. Ed. 853, 27 Sup. Ct. Rep. 499 (affirming 115 La. 698 (9 L. R. A.

(N. S. 1240, 116 Am. St. Rep. 179, 39 South, 846); *City of Augusta v. Kimball*, 91 Me. 605 (41 L. R. A. 475, 40 Atl. 666).

2. The maxim *mobilia sequunter personam* expresses a comprehensive and general rule applicable to personal property, and, subject to a considerable number of exceptions, this general rule is, for taxation purposes, invoked to determine the situs of personal property: *Callender Navigation Co. v. Pomeroy*, 61 Or. 343, 352 (122 Pac. 758). The rule *mobilia sequunter personam* does not arise out of any requirements of the Constitution, but is a mere fiction of the law, contrived for convenience and intended to work out justice; and, therefore, it is not permitted to govern when justice does not demand that it should do so, and it cannot prevail when inconsistent with express provisions of statute: *Board of Assessors v. Comptoir National*, 191 U. S. 388 (48 L. Ed. 232, 24 Sup. Ct. Rep. 109, see, also, Rose's U. S. Notes); *Union Refrigerator Transit Co. v. Lynch*, 18 Utah, 378 (55 Pac. 639, 48 L. R. A. 790); *Poppleton v. Yamhill Co.*, 18 Or. 377, 382 (23 Pac. 253, 7 L. R. A. 449).

3. Personal property includes intangibles as well as tangibles, for not only money, but also promissory notes, and accounts not represented by any written evidence of indebtedness, are generally treated as property, and therefore subject to taxation: 26 R. C. L. 138.

4. Notwithstanding the general rule expressed by the maxim *mobilia sequunter personam*, it is now firmly established that tangible personal property may be taxed at the situs where it is physically located, even though the owner resides in another jurisdiction. It is not necessary here to discuss the

extent or the limitations or the requisites of this established doctrine, for the reason that we are not called upon to decide any question concerning tangibles. While the assessment included the items of "furniture, library, instruments," and "money," it is conceded by the county that Endicott, Johnson & Company did not have any of these tangibles in Multnomah County; and, consequently, our attention will be confined to the two intangibles mentioned in the assessment,—notes and accounts.

If Endicott, Johnson & Company owned any promissory notes given for shoes sold to Oregon customers, the instruments were held in New York, and were not physically located in Oregon. There are cases in which statements may be found indicating a tendency to treat a promissory note, not merely as evidence of property, but as property itself, on the theory that the debt is inseparable from the paper which declares and constitutes it, and hence the paper is deemed to be so important an element of the value of what it represents as to make it analogous to tangible property: *Blackstone v. Miller*, 188 U. S. 189 (47 L. Ed. 439, 23 Sup. Ct. Rep. 277); *Wheeler v. Sohmer*, 233 U. S. 434 (58 L. Ed. 1030, 34 Sup. Ct. Rep. 607); *Walker v. Jack*, 31 C. C. A. 462 (88 Fed. 576).

5. Since the owners, Endicott, Johnson & Company, are domiciled in the State of New York, and the notes upon which they are assessed are held by them and are physically located in New York, it will not be necessary to decide whether, as was held in *Johnson v. City Council*, 3 Or. 13, the situs of a note for property taxation purposes is determined by the domicile of the owner regardless of the physical location of the paper evidencing the debt, or whether,

as was indicated in *Blackstone v. Miller* and kindred cases, a promissory note may be assimilated to tangibles on the ground that it not only declares the existence of the debt, but also constitutes the debt, and the paper itself being tangible, is capable of physical location.

6. If jurisdiction to levy a property tax is to be determined solely by the domicile of the owner, then the disputed assessment was void for the reason that the owners of the notes and accounts are domiciled in the State of New York. While it is settled as a matter of constitutional law that the situs of the debt or credit, for the purposes of property taxation, cannot arbitrarily be made to depend solely upon the domicile of the debtor, nevertheless a debt or credit may, in some circumstances, be given a situs for property taxation at a place other than the domicile of the owner. 'Although it is the general rule that the situs of intangibles cannot be assigned to a place other than the domicile of the owner, and although the domicile of the debtor cannot be made the single determining factor, nevertheless there are recognized exceptions to the general rule; as, where there is such a combination of circumstances as produces what is referred to in the books as a "business situs," as distinguished from the domicile of the owner. A precedent giving concrete illustration of the application of the doctrine of "business situs" is found in *Marshall-Wells Hardware Co. v. Multnomah County*, 58 Or. 469 (115 Pac. 150). It is impossible to frame an accurate formula which will include every case properly subject to the operation of the rule of "business situs," and exclude every case legally beyond its grasp, for each case is largely dependent upon its own facts. In an exhaustive and

well-considered note to *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, appearing in L. R. A. 1915C, 903, 925, the author states that:

“The term ‘business situs,’ frequently employed by the courts to indicate a situs for credits apart from the creditor’s domicile, though not very precise or accurate in its import, does suggest an indispensable condition of such a situs, that is, the necessity of something like a general, or more or less continuous, course of business or series of transactions within the state, as distinguished from mere sporadic and isolated transactions.”

In *Johnson County v. Hewitt*, 76 Kan. 816 (93 Pac. 181, 14 L. R. A. (N. S.) 493), when referring to the question of “independent situs” for notes and mortgages, the court says:

“Generally the element of separation from the domicile of the owner and fairly permanent attachment to some foreign locality should appear, together with some business use of them, or some power of managing, controlling, or dealing with them in a business way.”

Where property is used in a business carried on in one state, and the owner of the property is domiciled in another state, the property which is so used in that business becomes localized at the place where such business is conducted, acquires a “business situs,” and is taxable at that “business situs”; and so, too, credits arising out of that business, whether they be accounts not evidenced by any writing, or whether they be in the concrete form of notes, may by legislation be made taxable at such “business situs”: *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U. S. 346 (55 L. Ed. 762, 31 Sup. Ct. Rep. 550, L. R. A. 1915C, 903); *Assessors v. Comptoir National*, 191 U. S. 388 (48 L. Ed. 232, 24 Sup. Ct. Rep. 109);

Goldgart v. People, 106 Ill. 25; *In re Jefferson*, 35 Minn. 215 (28 N. W. 256).

7. In the instant case, however, we do not find any one of the several circumstances which usually appear, either singly or in combination, in adjudications where it has been held that intangibles had become separated from the domicile of their owner by reason of having been localized at a given "business situs" in a jurisdiction other than the domicile of the owner. There is no branch office or place of business in Oregon. There is no agent in Oregon, except a traveling salesman, and his only authority is to solicit orders. He does not receive payments, and he has no authority to make collections; payments are made by remittances to New York. No goods of any kind are stored in Oregon; but all orders are filled in New York, and the goods are shipped directly to the customer. Endicott, Johnson & Company are domiciled in New York; they have no property of any kind in Oregon. The record does not disclose whether Endicott, Johnson & Company is a corporation, or a partnership, or an individual operating under a trade name, although we infer from the printed briefs that the company is a partnership; but if the company is a corporation it cannot be compelled to pay corporation license fees in this state, for the reason that the business done by it in this state is pure interstate commerce: *Vermont Farm Mach. Co. v. Hall*, 80 Or. 308 (156 Pac. 1073); *Deardorf v. Idaho National Harvester Co.*, 90 Or. 425 (177 Pac. 33). If, as was done by Marshall-Wells Hardware Company (*Marshall-Wells Hardware Co. v. Multnomah Co.*, 58 Or. 469 (115 Pac. 150)), Endicott, Johnson & Company had localized any part of their business in Oregon so as to create a "business situs" here, then not only the tangibles used here in such business, but

also the accounts and notes arising out of such business could be separated from the domicile of the owners, and be made liable for the payment of a property tax; but, as already stated, the circumstances attending the business transacted by Endicott, Johnson & Company did not create a "business situs" in Oregon, and consequently Multnomah County cannot lawfully levy a property tax on any notes or accounts held by Endicott, Johnson & Company. In other words, a statute designed to tax notes and accounts circumstanced as are the notes and accounts now under consideration would be unconstitutional because of a lack of jurisdiction over them.

8. While what we have already said is sufficient finally to dispose of this controversy, yet we may with propriety add that an examination of Sections 3551 and 3553, L. O. L., when made in the light of the history of these sections, will result in the conclusion that this legislation was not intended to cover notes and accounts like those owned by Endicott, Johnson & Company.

Originally, Section 3551, L. O. L., in part read as follows:

" * * all property, real and personal, within this state, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law": Deady's Code, p. 893, § 1.

Although this section was amended in 1876 (Laws 1876, page 69), the quoted part of Section 3551 stood unchanged until 1907, when it was amended so as to read as it now appears:

" * * all personal property situated or owned within this state, except such as may be specifically exempted by law, shall be subject to assessment and taxation in equal and ratable proportion": Laws 1907, Chapter 268.

In its original form, Section 3553, L. O. L., so far as it is material here, was worded as follows:

“The terms ‘personal estate’ and ‘personal property’ shall be construed to include * * all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise. * * ” Deady’s Code, p. 894, § 3.

This statute remained unchanged until 1907, when it was amended so as to read as it now appears:

“The terms ‘personal estate’ and ‘personal property’ shall be construed to include all things in action, * * all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage, or otherwise, either within or without this state; * * ” Laws 1907, Chapter 268, § 3.

In 1890 this court, construing the statutes then in force, and deciding a case where a person domiciled in this state sent moneys into Washington territory and caused them to be loaned there by his agents, who took notes secured by mortgages on real property situated there, and the agents retained the notes and mortgages in their possession, held that this state could not tax the money, notes, or mortgages, basing the decision upon the wording of the statute: *Poppleton v. Yamhill Co.*, 18 Or. 377 (23 Pac. 253, 7 L. R. A. 449). It will be noted that Section 3553, L. O. L., defines the “personal property” which, according to Section 3551, L. O. L., shall be subject to assessment and taxation; and, included in this definition of personal property are “debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise, either within or without this state.” It is obvious that the notes and accounts for which Endicott, Johnson & Company have been assessed are not situated in this state; nor can it be said that they are owned in this state, be-

cause the owner is domiciled in New York. See opinion of Mr. Justice HATCH in *People v. Barker*, 84 App. Div. 469 (83 N. Y. Supp. 33, 37), and see, also, note in 36 L. R. A. (N. S.) 297.

9. When, as already stated, we read these two sections of the Code in the light of their history and when we do this, remembering that the domicile of the owner *prima facie* furnishes the situs of personality for the purposes of property taxation, and that unequivocal words are ordinarily needed in any legislation designed to separate the personal property from the domicile of the owner, it becomes manifest that the legislature did not attempt to tax notes and accounts arising out of business transactions like those involved here: *Johnson v. City Council*, 3 Or. 13; note in L. R. A. 1915C, 904, 910; 26 R. C. L. 287; *W. W. Kimball Co. v. Shawnee Co.*, 99 Kan. 302 (161 Pac. 644, L. R. A. 1917B, 1282); *Dallinger v. Rapello* (C. C.), 14 Fed. 32; *Bears v. Grand Rapids*, 129 Mich. 572 (89 N. W. 328).

The final order made by the Circuit Court annulling the assessment is affirmed. **AFFIRMED.**

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

INDEX.

(693).

INDEX.

ABANDONMENT.

See Vendor and Purchaser, 5.

Abandonment of a Fixed Fishing Location.

See Fish, 11.

ACCOUNT-BOOK.

Entries Made by Deceased Person in His Account-book Admissible.

See Evidence, 1.

Account Stated—Not Presumed to Extend to Items Arising After Statement.

1. An account stated is not presumed to extend to items arising after statement of the account. (O'Day v. Spencer, 73.)

ACQUIESCENCE.

See Contracts, 11.

ADMISSIONS.

Statements of Ancestor Admissible Against Heir Claiming Under Him by Descent.

See Evidence, 3.

ADVERSE POSSESSION.

Adverse Possession—Evidence—Gift by Father to Daughter.

1. In a daughter's suit to quiet title to land claimed to have been given her by her father, evidence held to show that the father made a parol gift of the land to the daughter, at which time she took possession of the land as her own, and continued in exclusive occupancy under the gift. (Miller v. Conley, 413.)

Adverse Possession—Gift of Land by Parol—Possession for Ten Years Gives Fee-simple Title.

2. Where a gift of land is made by parol, and the donee takes possession, adverse possession is established, which, continued for ten years, gives the donee a fee-simple title. (Miller v. Conley, 413.)

Reply Alleging Adverse Possession No Departure.

See Pleading, 6.

Diversion for Less Than Ten Years No Vested Right.

See Waters, 1.

AGENCY.

See Sales, 6.

General Verdict for Defendant Sustained, Notwithstanding Finding of Undisclosed Agency.

See Sales, 9.

Purchaser of Timber Held not Agent.

See Principal and Agent, 3.

One Deals With Alleged Agent at His Own Risk.

See Principal and Agent, 4.

AMENDMENT.

See Pleading, 3, 4.

Void Amendment Leaves Statute Unchanged.

See Statutes, 2.

Refusal to Permit Amendment to Answer.

See Pleading, 5.

ANIMALS.**Animals—Damages for Trespassing by Sheep.**

1. Evidence held sufficient to support a finding that land depastured by sheep was damaged to the extent of \$250. (Brown v. McCloud, 549.)

Animals—Trespass—Unfenced Lands.

2. That lands were unfenced and stock could roam thereon at will did not authorize defendant to herd or drive his sheep upon the land, nor to permit them to graze thereon. (Brown v. McCloud, 549.)

APPEAL AND ERROR.**Appeal and Error—Filing Brief—Time—Dismissal.**

1. Respondent's brief filed after the 20 days from service of appellants' brief allowed by Supreme Court Rule 8 (89 Or. 713, 173 Pac. viii) will be stricken on motion; time not having been extended. (Clatsop County v. Wuopio, 1.)

Appeal and Error—Court Reversing Judgment in Equitable Action Triable at Law will Remand Case for Trial.

2. In beneficiary's action in equity to revive and restore canceled policy and to recover thereon, Supreme Court, in reversing judgment for beneficiary on ground that beneficiary's remedy was an action at law, will remand cause under Laws of 1917, page 126, so that beneficiary may have case tried at law, with permission to beneficiary to amend her pleadings. (Burr v. Mutual Life Ins. Co., 14.)

Appeal and Error—Order Directing Receiver to Pay Costs is not Appealable.

3. An order directing receiver to pay the costs previously adjudged against the defendants in the suit out of funds of defendant company then in the receiver's hands is an interlocutory order which is not appealable, but which can be reviewed, if at all, only after the final determination of the suit. (Baillie v. Columbia Gold Mining Co., 32.)

Appeal and Error—Findings of Court Sitting Without Jury have Effect of Verdict.

4. Findings of fact by court where jury was waived have the effect of a verdict, and must be sustained if supported by any evidence. (O'Day v. Spencer, 73.)

Appeal and Error—Discrepancy as to Plaintiff and Plaintiffs Ascribed to Clerical Errors.

5. Where in the body of a complaint reference is sometimes made to "plaintiff," sometimes to "plaintiffs," and the briefs make no reference to these discrepancies, the difference will be ascribed to clerical errors. (Chevchuk v. Kotchik, 181.)

Appeal and Error—Exceptions to Instructions Partly Favorable Should be Pointed to Part Complained of.

6. Where a party is excepting to a long series of paragraphs of instructions, part of which are favorable to him, and other parts vague and ambiguous, he should point out to court particular fault complained of, or at least point his exceptions to part particularly claimed to be erroneous. (Hurst v. Hill, 311.)

Appeal and Error—Subjunctive Instructions Based on Hypothetical Condition Held Harmless.

7. In action for failure to deliver potatoes sold, instructions subjunctive in character and based on hypothetical condition that a reasonable time for performance of the contract had expired when assigned by the buyer to plaintiff *held* harmless. (Hurst v. Hill, 311.)

Appeal and Error—Complaint cannot be Made of Too Favorable Instruction.

8. Appellant cannot complain on account of an instruction more favorable than he had a right to ask. (Hurst v. Hill, 311.)

Appeal and Error—Only Sufficiency of Findings to Support Judgment Reviewable Without Bill of Exceptions.

9. In the absence of bill of exceptions, the appellate court can consider only whether the findings are sufficient to support the judgment. (Astoria v. Zindorf, 332.)

Appeal and Error—Conflicting Evidence—Verdict not Reviewed.

10. A verdict on conflicting evidence will not be reviewed. (McDonald v. Supple, 486.)

Appeal and Error—No Appeal from Circuit Court to Circuit Court.

11. There can be no appeal from the Circuit Court to the Circuit Court, especially to the same Circuit Court. (Nault v. Palmer, 538.)

Appeal and Error—Nonappealing Party cannot Support Judgment by Claim of Error in Trial Court's Ruling.

12. In ejectment action judgment for defendants, erroneous because they failed to deny, or plead or prove a defense to, plaintiff's allegation of ownership in fee, could not, on appeal by plain-

tiff alone, be supported by defendants on the theory that the trial court erred in ruling that no estoppel against plaintiff could be proved. (Pacific Livestock Co. v. Portland Lbr. Co., 567.)

Appeal and Error—Verdict as to Damages in Ejectment Suit Held Conclusive on Appeal.

13. Where, in an ejectment suit submitted to the jury on the question of damages, a general verdict in defendant's favor was returned, such a verdict was conclusive on the question of fact involved in the claim for damages, and cannot be disturbed on appeal. (Pacific Livestock Co. v. Portland Lbr. Co., 567.)

Appeal and Error—Verdict on Conflicting Evidence not Disturbed.

14. Verdict based on conflicting evidence will not be disturbed on appeal. (Whetstone v. Jensen, 576.)

Appeal and Error—Notice of Appeal—Sufficiency.

15. Great liberality should be indulged in, in judging the sufficiency of notice of appeal. (McFarland v. Hueners, 579.)

Appeal and Error—Judgment—Discrepancy in Date not Fatal to Notice of Appeal.

16. Mere discrepancy in the date of judgment, as recited in the notice of appeal, is not fatal, where the judgment is otherwise sufficiently identified by the transcript to inform the adverse party fairly as to the judgment really appealed from. (McFarland v. Hueners, 579.)

Appeal and Error—Judgment—Notice of Appeal—Sufficiency.

17. The only question in determining the sufficiency of notice of appeal is whether it appears from notice and transcript, including bill of exceptions and undertaking, that judgment brought up in transcript is really the one appealed from in the notice, and that respondent was fairly notified thereof. (McFarland v. Hueners, 579.)

Appeal and Error—Judgment—Misstating Date—Notice of Appeal Sufficient.

18. Notice of appeal held sufficient under Section 550, L. O. L., though it stated October 20th as the date of judgment, which was not formally entered by the clerk until the 25th, though, under Section 201 he should have entered it on the 20th. (McFarland v. Hueners, 579.)

Appeal and Error—Attorney and Client—Attorney's Fee—Included in Verdict.

19. In action on note given for part of the price of realty, agreement of parties in open court through their attorneys as to the matter of attorney's fees is binding on them, and defendant cannot complain on appeal because the fee which he agreed was reasonable was included in the directed verdict for plaintiff. (McFarland v. Hueners, 579.)

Appeal and Error—Opinion Evidence as to Value of Attorney's Services not Binding.

20. In reviewing an award of attorney's fees, opinion evidence as to the value of attorney's services is not binding on the appellate court. (Tillamook County v. Johnson, 623.)

Appeal and Error—Transcript not Filed Within Thirty Days—Effect.

21. Where an appeal was perfected April 16, 1920, and no order extending the time for filing the transcript appeared of record, the appeal will, under Section 554, L. O. L., as amended by Gen. Laws of 1913, page 618, requiring the transcript to be filed in thirty days, be dismissed, under subdivision 2, if the transcript is not filed within the required time. (Russell v. Smith, 629.)

Appeal and Error—Dismissal of Appeal—Judgment Against Sureties.

22. Where an appeal was dismissed, under Section 554, subdivision 2, L. O. L., as amended by Gen. Laws of 1913, page 618, for failure of appellant to file a transcript within thirty days, judgment will, under subdivision 3, be enforced against the appellant and his sureties. (Russell v. Smith, 629.)

Appeal and Error—Judgment—Good as One Cause of Action not Reversed—Verdict.

23. In an action on two counts, appellate court, in holding judgment correct as to first cause of action and incorrect as to other cause of action, will not reverse judgment, though verdict of jury was for a single sum, where the amount to which plaintiff was entitled under the first cause of action could be ascertained from the record, and the appellate court in such case will affirm judgment as to first cause of action and reverse it as to second cause of action. (Martin v. Gauld Co., 635.)

Appeal and Error—Trial—Findings—Entitled to Weight—Disputed Question of Fact.

24. Opinion of the trial court in an equity case on a disputed question of fact is entitled to great weight because of opportunity had of seeing and hearing the witnesses. (James v. Ward, 667.)

Appeal and Error—Foreclosure of Contract—Excessive Attorney's Fee.

25. Allowance of excessive attorney's fee on foreclosure of contract for sale of land is not immaterial, though there be no personal judgment, and purchaser has indicated intention not to reinstate the contract, as conditions may change and he may desire to redeem. (James v. Ward, 667.)

APPEARANCE.**Appearance—Answer on the Merits General Appearance, Though Reserving Right of Special Appearance to Object to Jurisdiction.**

1. Answer on the merits, though made after special appearance, and reserving right to object to jurisdiction, is nevertheless a general appearance. (Williams v. Seuffert Bros. Co., 163.)

Appearance—Motion to Quash Summons not Answer on Merits Amounting to “General Appearance.”

2. Motion of defendant foreign corporation to quash summons attempted to be served on it through corporation commissioner *held* not in nature of answer on merits to amount to “general appearance” and give court jurisdiction without regard to sufficiency of service. (*Beedle v. Stondall Land & Timber Co.*, 590.)

See Waters, 15.

APPROPRIATION.

See Pleading, 6.

See States, 1–3.

See Waters, 8, 9, 12.

ARBITRATION AND AWARD.

Arbitration and Award—“Umpire” Defined.

1. A third person, chosen by two arbitrators who cannot agree, is not, in the strict sense, an umpire, unless he succeeds to the duties of those who have chosen him to accomplish that wherein they have failed, making the original arbitrators *functus officio*. (*Lesser v. Palley*, 142.)

Arbitration and Award—Power of Two Arbitrators to Name Third not Exhausted by Single Nomination.

2. The power of arbitrators to select a third arbitrator or umpire on failing to agree is not necessarily exhausted by a single nomination, and was not exhausted where nominee died before having acted. (*Lesser v. Palley*, 142.)

Arbitration and Award—Death of Umpire or Arbitrator Nominated Did not Exhaust Power to Nominate.

3. Where two arbitrators selected to partition land could not agree and named a third arbitrator, and the three investigated the land, and, after agreeing to meet on the following Monday, separated and the third arbitrator died on Sunday, there was no such performance or action by the third arbitrator as would preclude the arbitrators from naming a successor. (*Lesser v. Palley*, 142.)

Arbitration and Award—Agreement of Submission Under Seal Revoked Only by Writing Under Seal.

4. The formality of a revocation of a submission of matters to arbitrators must conform to the formality of the submission, and if the submission is under seal, or by deed, the revocation must be under seal, and if the submission is in writing, the revocation must be in writing; a simple letter not being sufficient to revoke a submission under seal. (*Lesser v. Palley*, 142.)

Arbitration and Award—No Necessity for Hearing by Arbitrators Whose Only Duty was to Divide Realty.

5. Arbitrators selected to divide realty between owners are not different from referees in partition, and where it was not contemplated that they should do anything more than to go upon the premises, survey the same, and divide the ground into three tracts in the manner stipulated, and make a report of their action, an

award made by them was valid, although the parties were not given the opportunity to appear before them for a hearing. (*Lesser v. Palley*, 142.)

ASSESSMENT.

For Public Improvements.

See *Municipal Corporations*, 5-9.

ASSOCIATION.

Associations—May Take and Hold Personal Property.

1. Unincorporated associations may take and hold personal property, at least to the extent that persons giving or selling the same to it may not retake or otherwise dispose of it. (*Hartman v. Pendleton*, 503.)

ATTORNEY AND CLIENT.

Attorney and Client—Attorney's Right to Compensation will not be Denied Because His Opinion was Erroneous.

1. Where it appeared that defendant received a large sum of money as result of litigation, and there was no showing that the attorney's fee was to be contingent, the fact the attorney erroneously represented a sheriff's sale was valid will not, where there was no showing that defendant relied on it or was injured, prevent recovery of compensation. (*O'Day v. Spencer*, 73.)

Attorney and Client—Evidence Held Sufficient to Sustain Judgment in Favor of Attorney's Executrix.

2. In an action for legal services brought by an attorney's executrix, evidence held sufficient to sustain the judgment of \$250 for services; the opinion of another attorney not being contradicted. (*O'Day v. Spencer*, 73.)

Attorney and Client—Provision Fixing Compensation Attached to Appropriation to Pay Claim Supersedes Express Contract for Compensation.

3. Where Congress in appropriating a certain amount to pay certain claimants named in the act attached a proviso to the effect that no attorney representing a claimant should receive more than 5 per cent as compensation, such proviso superseded any express contract between attorney and claimants. (*Herrick v. Barzee*, 357.)

See *Appeal and Error*, 19, 20.

See *Contracts*, 6-8.

Excessive Attorney's Fee.

See *Appeal and Error*, 25.

See *Vendor and Purchaser*, 6.

AUTHORITY.

See *Waters*, 7.

Authority not Provable by Declarations.

See *Principal and Agent*, 2.

BALLOT TITLE.

See Waters, 3.

BANKS AND BANKING.**Banks and Banking—Evidence Held to Show Payment of Debt Collaterally Secured.**

1. Evidence held to show that a debt to a bank, to secure which a mortgage and note were given by the holder, a third party, to the bank, had been paid, so that the right to the note and mortgage reverted in the original holder thereof, as against assignee of one to whom bank had returned them. (Chase v. La Moree, 28.)

BENEFICIARY.

See Charities, 1-7.

Death of Beneficiary Held to Defeat Estate.

See Wills, 3.

BENEFITS.

See Municipal Corporations, 5-9.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.**Bills and Notes—Release from Liability for Breach of Contract Good Consideration, Despite Impossibility of Performing Contract.**

1. Where sellers of timber agreed to obtain the purchaser a right of way for a logging road over the land of another, to commence negotiations therefor at once, and use their best efforts to acquire such right at a reasonable price by grant or agreement, and if unable to do that within a reasonable time to organize a corporation and institute an action to acquire such easements by the right of eminent domain, the sellers cannot maintain that there was not a good consideration for a note given to relieve them of their liability under the contract on the ground that the contract was impossible of performance, in the absence of a showing that they used their best efforts to procure such right of way, by agreement or grant or otherwise, or that they organized a corporation or instituted an action to acquire it through eminent domain. (Elmira Lumber Co. v. Owen, 127.)

Bills and Notes—Misrepresentation—Fraud—Contracts.

2. The buyer of land was liable on his note given for part of the price, despite his allegations that plaintiff seller and his associates induced the buyer to make a change in the contract by falsely representing the law to the effect that by the change his

obligations and liabilities on the notes and mortgages executed by him would be no greater. (McFarland v. Hueners, 579.)

Bills and Notes—Assignment—Collateral Security—Recovery by Assignee.

3. An assignment of a note to plaintiff as collateral security is sufficient title to support recovery in his behalf. (McFarland v. Hueners, 579.)

See Evidence, 13.

See Taxation, 1-9.

BONDS.

See Waters, 13-20.

BREACH OF CONTRACT.

On Refusal of Treatment Under Contract, Another Request Unnecessary.

See Contracts, 1.

Limiting Place for Furnishing Medical Services not Authorized by Contract.

See Contracts, 4.

BREACH OF WARRANTY.

See Evidence, 7, 8.

See Sales, 5-9.

See Trial, 6.

See Witnesses, 1.

BRIDGES.

Bridges—Point of Accident, Relative to Liability of County, for Jury.

1. The question, relative to liability of county for death from a defect in a bridge, whether the point of the accident, not in dispute, was outside the corporate limits of a city, is for the jury on conflicting testimony, notwithstanding a civil engineer, who made a survey, testified on one side. (Coates v. Marion County, 334.)

Bridges—Evidence of Other Accidents at Same Place Competent on Question of It Being Dangerous.

2. Evidence of other accidents having occurred at the same place on a highway bridge is competent on the question of the place being dangerous. (Coates v. Marion County, 334.)

Bridges—Repairing by County Officials Admissible to Show County, and not City, Liable.

3. On the disputed question of whether the point on a bridge where an accident occurred was within the corporate limits of a city, or in the other part of the county, as plaintiff contended, the conduct

of the county officers in repairing it could be considered by the jury. (Coates v. Marion County, 334.)

BURDEN OF PROOF.

Heavy Burden on Party Claiming Deed a Mortgage.

See Mortgages, 2.

CAPITAL.

When Accumulated Funds Treated as Capital.

See Charities, 7.

CARRIERS.

Carriers—Rates are Subject to Control of Public Service Commission.

1. Under Laws of 1913, page 748, the right to fix rates for transportation primarily is lodged in the carrier, but subject, under Section 6906, L. O. L., to control and revision by the Public Service Commission either on its own motion or at the complaint of interested parties. (Hammond Lbr. Co. v. Public Service Com., 595.)

Carriers—Rates must be Reasonable.

2. Under Section 6887, L. O. L., the object to be obtained and the canon by which all the activities of the Public Service Commission are controlled is to establish a reasonable rate for services rendered or to be rendered by the carrier; unjust and unreasonable charges being prohibited. (Hammond Lbr. Co. v. Public Service Com., 595.)

Carriers—Finding as to Reasonableness of Rates Contrary to Evidence Beyond Power of Commission.

3. A finding of the Public Service Commission as to the reasonableness of a railroad's rates made without evidence or against the evidence is arbitrary and beyond the power of the commission, and an order based thereon is contrary to law and subject to be set aside by a court of competent jurisdiction. (Hammond Lbr. Co. v. Public Service Com., 595.)

Carriers—Reasonableness of Rate Fixed by Public Service Commission is Only Justiciable Question in Suit to Set Order Aside.

4. In suit to set aside an order of the Public Service Commission establishing rates for a railroad, the reasonableness of the rate is the only justiciable question, and the court will not assume the place of the commission or set its order aside on its own conception of its wisdom. (Hammond Lbr. Co. v. Public Service Com., 595.)

Carriers—Railroad Serving Logging Territory Entitled to Rates Which Provide for Amortization of Value of Road.

5. Under Article I, Section 18, of the Constitution, a railroad which serves a logging territory and will be without value save as junk on exhaustion of timber resources is entitled to charge such rates as will not only give a reasonable return on the money

invested, plus interest charges, but will also provide for amortization of the plant. (Hammond Lbr. Co. v. Public Service Com., 595.)

Carriers—Reasonable Interest on Investment Should be Allowed from Beginning.

6. In fixing rates for a railroad, a reasonable rate of interest on the investment in the property should be allowed from the beginning of the undertaking. (Hammond Lbr. Co. v. Public Service Com., 595.)

Carriers—Matter of Rates Continually Under Scrutiny of Commission.

7. Under Section 6906, L. O. L., the matter of a railroad's rates is continually under the scrutiny of the Public Service Commission in the exercise of a flexible, administrative authority, and can be reopened at any time, either on its own motion or the petition of interested parties. (Hammond Lbr. Co. v. Public Service Com., 595.)

CHARITIES.

Charities—Ambiguity as to Beneficiary Latent.

1. Any ambiguity as to beneficiary of bequest in trust to use the income for benefit of the library of the Commercial Association of Pendleton, of the City of Pendleton, Or., is latent. (Hartman v. Pendleton, 503.)

Charities—Extrinsic Evidence as to Beneficiaries Intended Inadmissible.

2. Under the rule that, where the language of a will is clear and of well-defined force and meaning, extrinsic evidence of intent is inadmissible to explain, enlarge, or contradict such language, the bequest being in terms for the library of the Commercial Association of Pendleton, of the City of Pendleton, if when the will was executed there existed an organization known by that name, and it owned a library, it may not be shown that the Pendleton Public Library was intended to be the beneficiary. (Hartman v. Pendleton, 503.)

Charities—No Latent Ambiguity as to Beneficiary Under Evidence.

3. Evidence held to show that at the time of making of a will making a bequest in trust for the benefit of the library of the Commercial Association of Pendleton such association owned a library, so that there was no latent ambiguity as to the beneficiary. (Hartman v. Pendleton, 503.)

Charities—Trustees Authorized to Make Purchases for Library.

4. A bequest to trustees of money to be invested by them and the income "to be used by them for the benefit of the library" of a certain association does not require them to pay the income to the association, but they may select and purchase the books or supplies. (Hartman v. Pendleton, 503.)

Charities—"Annual Income" to be Used by Trustee Means Annually.

5. Under bequest to trustees of money to be invested by them "and the annual income * * to be used by them" for the benefit

of a certain library, it is their duty to apply the income annually, and not accumulate it. (Hartman v. Pendleton, 503.)

Charities—Trustee not Chargeable With Costs.

6. A testamentary trustee of a fund for the benefit of a library, having with two claimants thereof refused to pay the income to the one entitled, but accumulated, not acting in bad faith, but on his honest conviction, should not be charged with the costs of the suit to determine right; it being a case which could not be decided at first blush, but only with the most careful deliberation. (Hartman v. Pendleton, 503.)

Charities—Action—Accumulated Funds—Treated as Capital.

7. Where, owing to controversy as to who was beneficiary of a library fund, intended annual expenditures were halted and accumulations not expended, so that the amount accrued, not including the principal, aggregates more than double the amount of the original fund, such fund will not be used all at once in the purchase of books, thus leaving the library to depend on a small income provided by an amount of \$5,000 bequeathed for its support, but the whole amount will be treated as principal, and the annual income applied to purchase of books and supplies. (Hartman v. Pendleton, 503.)

CHARTER OF CITIES.

PORTLAND.

See Cole v. Portland, 645.

See Portland v. New England Casualty Co., 48.

ROSEBURG.

See Giles v. Roseburg, 453.

CHATTEL MORTGAGES.

Chattel Mortgages—Allegation Defendant Mortgagor "Retains" Possession Means He "Detains."

1. In action by chattel mortgagee for possession, allegation of complaint that defendant "retains" possession of personalty means same thing as allegation he "detains" it. (First Nat. Bank v. Yocom, 438.)

Chattel Mortgages—Judgment in Action for Possession Sufficiently Describing Property.

2. In action for possession by chattel mortgagee, mortgage and complaint definitely describing property, judgment for plaintiff, which, after reciting a list of the chattels, refers to the complaint, the description of the personalty being sufficiently definite to enable the sheriff to execute the writ, is sufficient in its description of the property. (First Nat. Bank v. Yocom, 438.)

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charter of Cities.

CIVIL SERVICE COMMISSION.

See Evidence, 14.

See Municipal Corporations, 11, 12.

CLASS LEGISLATION.

See Constitutional Law, 2-6.

COLLATERAL SECURITY.

See Banks and Banking, 1.

COMMON KNOWLEDGE.

See Evidence, 4.

COMPENSATION.

Additional Compensation.

See Contracts, 10.

See Work and Labor, 1, 3.

CONDITIONAL SELLER.

See Sales, 10-12.

CONFESSION AND AVOIDANCE.

See Master and Servant, 1.

CONFLICTING EVIDENCE.

See Appeal and Error, 10, 14.

CONFIRMATION.

See Waters, 13, 15.

CONSIDERATION.

**Release from Liability for Breach of Contract Good Consideration,
Despite Impossibility of Performing Contract.**

See Bills and Notes, 1.

Conditional Sale Sufficient Consideration for Promise to Pay Price.

See Sales, 12.

Memorandum of Guaranty not Expressing Consideration Void.

See Statute of Frauds, 1.

CONSTITUTIONAL LAW.**Constitutional Law—Vesting Fish and Game Commission With Authority to Expend Moneys Discretionary With Legislature.**

1. Vesting the fish and game commission with authority to expend all moneys and license fees collected, as was done by Laws of 1915, Chapter 257, Section 3, as amended by Laws of 1917, Chapter 243, Section 1, was a matter within the discretion of the legislature, upon which the court has no right to express its views. (Holmes v. Olcott, 34.)

Constitutional Law—No Burden not Imposed on Similar Class can be Imposed on One Class.

2. Generally, no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition, or in like circumstances; and no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes. (State v. Savage, 53.)

Constitutional Law—Equal Protection of Law Denied Unless Classification is not Arbitrary.

3. If statute applies only to one class of persons, and imposes upon them duties not common to others, there must exist in the relations of such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary, else there will be a denial of the equal protection of the law. (State v. Savage, 53.)

Constitutional Law—Prohibiting Taking of Salt-water Crabs, Class Legislation.

4. Laws of 1915, page 31, and Laws of 1917, page 848, amending Section 5360, L. O. L., prohibiting the taking of salt-water crabs from Coos County for purpose of sale, by making statute inapplicable to those engaged in canning business, without a good reason for so doing, held discriminatory class legislation, and void under Article I, Section 20, of the Constitution. (State v. Savage, 53.)

Constitutional Law—Local Laws cannot be Declared Invalid Unless Discriminatory or Arbitrary.

5. Where there is no express constitutional restriction against the passage of local laws by a state legislature, the courts cannot hold such laws void for want of constitutional authority to enact them unless they are clearly discriminatory or merely arbitrary. (State v. Savage, 53.)

Constitutional Law—Equal Protection of Laws Defined.

6. The equality clause, United States Constitution, Fourteenth amendment, requires that the law, when impartially applied, shall operate equally and uniformly upon all persons in similar circumstances, and confers like privileges to all who may comply with its terms or come within its provisions, and does not prohibit legis-

lation which is limited, either in the objects in which it is directed or by the territory within which it is to operate. (State v. Savage, 53.)

Constitutional Law—Validity of Statute not Determined Unless Necessary to Decision.

7. Whether the School Tenure of Office Act February 7, 1913 (Laws 1913, p. 69), as amended by Laws of 1917, page 196, is contrary to Article IV, Section 22 of the Constitution, requiring amendments to set forth in full the act or section amended, will not be determined in a proceeding where its determination is not necessary to the decision. (Taggart v. School Dist. No. 1, 422.)

Constitutional Law—Power to Compel Service and Reasonable Charges is Legislative.

8. The power to compel railroads to render adequate service and to charge reasonable rates for it is legislative in its nature and not judicial. (Hammond Lbr. Co. v. Public Service Com., 595.)
See Statutes, 1.

Right of Trial by Jury.

See Jury, 1, 2.

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

CONSTITUTION OF UNITED STATES.

Cited and Construed in this Volume.

See Table in Front of this Volume.

CONSTRUCTION.

See Guaranty, 2.

See Master and Servant, 4.

CONTRACTOR.

See Highways, 1-3.

See Municipal Corporations, 1-4.

CONTRACTS.

Contracts—On Refusal of Hospital Treatment Under Contract Another Request Unnecessary.

1. Where defendant hospital association, which had contracted to furnish medical, surgical, and hospital service to plaintiff in case of illness, in replying to plaintiff's request for care and service virtually refused to treat plaintiff on the ground that her disease was chronic, and not subject to treatment under the contract, plaintiff was relieved from making further requests for treatment. (Coffey v. Northwestern Hospital Assn., 100.)

Contracts—Whether Plaintiff had Chronic Disease Within Contract for Treatment, for Jury.

2. In an action for breach of a contract to render plaintiff medical and surgical treatment and furnish hospital facilities whether plaintiff's ailment was chronic, and therefore not covered by the contract, was a question of fact for the jury, a chronic disease being one of long duration, or characterized by slowly progressive symptoms. (Coffey v. Northwestern Hospital Assn., 100.)

Contracts—Failure to Pay Assessment not Breach of Contract.

3. In an action for breach of a contract to furnish medical and hospital services, the fact that plaintiff did not pay an assessment when due is immaterial, where the contract provided that "no cancellation of membership shall be made while the member is sick," and plaintiff was ill at such time. (Coffey v. Northwestern Hospital Assn., 100.)

Contracts—Limiting Place for Furnishing Medical Services not Authorized by Contract.

4. In an action for breach of a contract by defendant hospital association to furnish free hospital services where a hospital is provided, and free medical and surgical treatment, without specification as to place to be rendered, *held*, that an instruction that, under the terms and conditions of the contract, defendant was not bound to render services to plaintiff outside of the city and county in which defendant hospital was located was properly refused. (Coffey v. Northwestern Hospital Assn., 100.)

Contracts—Mere Impossibility of Execution by Promisor no Excuse for Failure to Perform.

5. To excuse performance of a valid and lawful contract made upon a sufficient consideration, it must appear obviously impossible of performance in the nature of things by anyone; mere impossibility of execution by the promisor not being enough. (Elmira Lumber Co. v. Owen, 127.)

Contracts—Attorney may Appear Before Legislative Body to Procure Appropriation.

6. A contract for services to be rendered by an attorney before a legislature, or the Congress of the United States, in securing the passage of a law providing for the payment of a just claim, is not unlawful and not against public policy, if it does not contemplate the use of improper means and if the services to be rendered are such as appeal to the reason of those whom it is sought to persuade. (Herrick v. Barzee, 357.)

Contracts—Advice of Attorney to Petition Legislators Did not Render Contract to Procure Passage of Law Unlawful.

7. A contract for services to be rendered by an attorney before Congress in securing the passage of a law providing for the payment of a just claim was not rendered unlawful or contrary to public policy because it was attempted to be carried out in part by the claimants writing to the senators and representatives in Congress, upon the advice of the attorney; the United States Constitution securing to

the people the right to petition the government for a redress of grievances. (Herrick v. Barzee, 357.)

Contracts—Services of Attorney Under Contract to Procure Legislation Legalized by Provision.

8. A provision attached to an act of Congress appropriating money to pay claimants, providing that no agent or attorney should receive more than 5 per cent thereof for his services, legalized a contract between the claimants and an attorney agreeing to secure an appropriation to the claimants. (Herrick v. Barzee, 357.)

Contracts—Evidence—Surrounding Circumstances.

9. Under Section 717, L. O. L., for the proper construction of a written contract, the circumstances under which it was made, including the situation of the subject matter and parties, may be shown. (McDonald v. Supple, 486.)

Contracts—Partial Payments—Additional Compensation.

10. Where a contract for the construction of steel barges out of fabricated materials provided for partial payments, the fact that the contractor accepted partial payments at the contract rate, notwithstanding defendant's failure to carry out his agreement greatly increased the labor cost, etc., did not preclude recovery of additional compensation, where defendant frequently assured the contractor that when the work was done he would make the same right. (McDonald v. Supple, 486.)

Contracts—Modification—Waiver—Acquiescence.

11. A party to a contract may waive any term intended for his benefit, and this, if agreed to and acquiesced in by the other party, modifies the contract accordingly. (James v. Ward, 667.)

See Appeal and Error, 25.

See Bills and Notes, 2.

See Evidence, 10-12.

See Guaranty, 1.

See Master and Servant, 1, 2.

See Pleading, 3.

See Specific Performance, 1-3.

See Vendor and Purchaser, 3-6.

See Work and Labor, 1-3.

Foreclosure of Contract.

See Appeal and Error, 24.

See Vendor and Purchaser, 6.

Fixing Compensation of Attorney Under Contract.

See Attorney and Client, 3.

Release from Liability for Breach of Contract Good Consideration Despite Impossibility of Performing Contract.

See Bills and Notes, 1.

Validity of Contract Affecting Federal Legislation.

See Courts, 4.

Contracts as to Dower or Curtesy Between Husband and Wife are Void.

See Curtesy, 1-4.

Fixing Reasonable Amount for Delay is Valid.

See Damages, 1.

Nonperformance of Contract for Medical Services.

See Damages, 1-3.

Technical Meaning of Contract Notwithstanding Presumptions.

See Evidence, 9.

Equity will Create Lien to Carry Out Contract to Support Third Person.

See Liens, 1.

Reply Alleging Waiver of Stipulation in Contract Sued on Held a Departure.

See Pleading, 2.

Purchaser of Timber Held not Agent so as to Bind Seller by Contract for Construction of Logging Road.

See Principal and Agent, 3.

Evidence Held not to Show That Contract Failed to Include Premises Involved in Ejectment.

See Reformation of Instruments, 1.

Buyer Who Demands Delivery Within Reasonable Time can Enforce Contract.

See Sales, 1.

Demand Necessary to Fix Liability.

See Sales, 2.

Not Fixing Time for Delivery Lapses After Reasonable Time Without Demand.

See Sales, 3.

Either Party to Contract for Purchase Entitled to Remedy.

See Specific Performance, 1.

One of Three Joint Purchasers Entitled to Remedy Against Joint Purchasers.

See Specific Performance, 2.

As to Signing of Contract not Erroneous in View of Other Instructions.

See Trial, 1.

CORPORATIONS.

Corporations—Subscribers to Stock Liable to Pay on Express or Implied Promise.

1. Persons subscribing to the capital stock in a corporation are obligated to pay therefor when regularly required to do so, and

the taking of stock without subscription implies a promise to pay. (Campbell v. Coin Mach. Mfg. Co., 119.)

Corporations—Reduction of Capital Stock by Reducing Par Value of Shares Entitled Subscriber to Rescind and Recover Money Paid.

2. Where plaintiff agreed to purchase five shares of treasury stock of defendant corporation of a par value of \$100 a share, defendant's capital stock consisting of \$4,000,000, divided into 40,000 shares, and thereafter defendant reduced its stock to \$400,000, consisting of 40,000 shares of a par value of \$10, defendant thereby voluntarily put it out of its power to perform, and is liable for the money paid. (Campbell v. Coin Mach. Mfg. Co., 119.)

Corporations—Evidence Held to Show Indebtedness was Paid by Transfer of Stock.

3. In suit by children of one brother and his wife against children of another brother to have declared a mortgage a deed of a sawmill from plaintiffs' father and mother to defendants' father, and to secure adjudication stock was transferred as security for indebtedness owing by plaintiffs' father, evidence held to show defendants' father held stock as security until a certain date, but that at such time an indebtedness owing to him from plaintiffs' father was paid with five shares, and that defendants' father became absolute owner of such number. (Jones v. Jones, 197.)

Corporations—Act Authorizing Service Through Corporation Commissioner Without Retroactive Effect.

4. Act authorizing service of summons on foreign corporation through corporation commissioner for state did not have retroactive effect, authorizing service on corporation which at time of passage of act and its taking effect had no organization or agent within state, and had retired from state and ceased to do business therein three years before; it being immaterial commissioner transmitted summons to home office of corporation. (Beedle v. Stondall Land & Timber Co., 590.)

COSTS.

Costs—Double Mileage—Witnesses—Statutes.

1. Court did not err in allowing double mileage and per diem fees to a witness for plaintiff under Section 818, L. O. L., although there was no showing that the witness was actually paid double fees. (Brown v. McCloud, 549.)

Trustee not Chargeable With Costs.

See Charities, 6.

COURTS.

Courts—Rules cannot Regulate Matter Regulated by Statute.

1. Where the courts exercise the power of making rules, whether such power is conferred by statute or deemed to exist in the absence of statute, they cannot by mere rule of court regulate a matter already regulated by statute. (Schnitzer v. Stein, 343.)

Courts—Rule Requiring Payment of Jury Fee Before Trial Held to Violate Statute.

2. Assuming that under Section 916, L. O. L., the Circuit Court, in the absence of statute, can by rule require the payment of the jury fee four days before the cause is called to be set for trial under penalty of losing the right to a jury trial, such a rule violates Section 1117, L. O. L., as amended by Laws of 1915, page 91, requiring the clerk to collect such fee at the time the action, suit, or proceeding comes on for trial by jury, especially as the amendment eliminated a provision for payment two or four days before the case was called. (Schnitzer v. Stein, 343.)

Courts—Rules must Yield to Statute.

3. When a rule of court conflicts with the statute, it must yield to the statute. (Schnitzer v. Stein, 343.)

Courts—Federal Decisions Followed in Determining Validity of Contract Affecting Federal Legislation.

4. In determining whether or not a contract for services to be rendered by an attorney before the Congress of the United States in securing the passage of a law is against public policy, decisions of the federal courts should be taken as a guide; federal legislation being concerned. (Herrick v. Barzee, 357.)

See Appeal and Error, 10.

See Waters, 7.

CRIMINAL LAW.**Criminal Law—Objection That Complaint Stated Two Offenses and was Indefinite Held not Raised by Demurrer.**

1. Where a complaint charging that defendant unlawfully operated a set-net bore the indorsement, "Sec. 1, Chap. 362, Laws 1917, for penalty, Chap. 31, Laws 1919," and the indorsement was amended by striking out the reference to Laws of 1917, and inserting Section 1, Chapter 49, Laws of 1915, instead, the objection on appeal that the complaint was indefinite and stated violation of the two different laws was not raised by demurrer attacking jurisdiction of the court and the sufficiency of the facts stated to constitute an offense, and such matter could be raised only by demurrer, under Section 1491, subdivisions 2, 3, L. O. L. (State v. Blanchard, 79.)

Criminal Law—Failure to Show by Record Disposition of Demurrer not Ground for Reversal.

2. In view of Section 1626, L. O. L., providing that on criminal appeals the court must give judgment without regard to technical errors or defects, in a prosecution resulting in conviction of manslaughter, formal disposition of demurrer to the indictment was not so essential that silence of the record thereon constitutes a fatal defect, where defendant afterward entered plea of not guilty, and went to trial without objection or question. (State v. Butler, 219.)

Criminal Law—Testimony of Arrangement in Defendant's Absence not Hearsay.

3. In view of Section 707, L. O. L., recognizing *res gestae* both as to facts in dispute and as to some act that becomes important as evidence of facts in dispute, in a prosecution resulting in conviction of manslaughter, the controversy having originated over a fence across a road, testimony tending to show the arrangement with other persons under which decedent came to be at the scene of the shooting on watch to see who was putting up the fence *held* not incompetent hearsay because arrangement was made in defendant's absence. (State v. Butler, 219.)

Criminal Law—Homicide—Evidence of Other Crime as Showing Identity.

4. In a prosecution resulting in conviction of manslaughter, the killing having taken place at defendant's fence, which he was putting up nightly to obstruct a road, decedent with others having been on watch to find out who was doing it, testimony of such others as to what occurred probably half an hour before the killing on the other side of the field from where the killing occurred, where the road went through the fence on that side, and that defendant then drew gun on the others when they were coming close enough to identify him, *held* admissible, and not objectionable as showing a collateral offense, and sufficient to justify the jury in concluding it was defendant. (State v. Butler, 219.)

Criminal Law — Homicide — Argumentative Instruction on Self-defense.

5. In a prosecution resulting in conviction of manslaughter, instruction on the right of self-defense arising from an assault or attack with a dangerous weapon *held* properly refused as argumentative and invading the province of the jury. (State v. Butler, 219.)

Criminal Law—Following Language of Requested Instructions.

6. The trial court is not required to give charges asked for in the exact language in which they are requested, but need only cover the principles of law involved. (State v. Butler, 219.)

Criminal Law—Reading Instructions Together.

7. Instructions must be read together, and cannot be considered each by itself. (State v. Butler, 219.)

Criminal Law—Argument of District Attorney.

8. Though the language of the district attorney in argument was bitter and somewhat intemperate, reversal is not justified on that account alone. (State v. Butler, 219.)

Criminal Law—Instruction not Coercing Jury—"Stubborn."

9. In a prosecution resulting in conviction of manslaughter, instruction to the jury by the court on their inability to agree, sending them back for further consideration, and urging them to try to agree, if possible, *held* not erroneous as coercive, despite the

expression admonishing them not to get stubborn and say they would not; "stubborn" meaning "unreasonably unyielding." (State v. Butler, 219.)

Criminal Law—False Assumption in Argument of District Attorney.

10. In prosecution resulting in conviction of manslaughter, the assumption by the district attorney in argument that certain witnesses had identified defendant in a certain place on the night of the killing *held* not reversible error as more in the nature of a misconstruction of the testimony than a positive and willful misstatement; the charge having instructed the jury to disregard statements not sustained by evidence. (State v. Butler, 219.)

CROSS-EXAMINATION.

See Witnesses, 1.

CURTESY.

Curtesy—Exists in Equitable Estate Notwithstanding Statute; "Fee."

1. Section 7315, L. O. L., as amended by Laws of 1917, page 687, giving widowers the right as tenants by the curtesy to the use for life of one half of the lands of their wives, provided that any man entitled to curtesy may elect in lieu thereof to take the undivided third part of his wife's land in his individual right in "fee," does not abolish the right of curtesy in equitable estates as previously existing, as the word "fee" is used as meaning simply an estate of inheritance. (Chance v. Weston, 390.)

Curtesy—Depends on Character of Wife's Title.

2. A husband's right to curtesy depends on the character of the estate which the wife had in her lifetime, and not on the estate which her heirs would take by descent of the source of her title. (Chance v. Weston, 390.)

Curtesy—Husband not Barred by Conveyance in Trust for Wife.

3. Where husband and wife conveyed land in trust for the wife, and the wife died intestate as to such land, the husband was not barred by such conveyance of his right of curtesy in the land. (Chance v. Weston, 390.)

Curtesy—Dower—Contracts Between Husband and Wife are Void.

4. Husband and wife cannot contract with each other regarding any estate growing out of the marriage relation, and conveyances between them intended to cut off or relinquish curtesy or dower are void. (Chance v. Weston, 390.)

CUSTODY OF CHILDREN.

See Divorce, 3.

DAMAGES.

Damages—Inference of Physical Suffering from Nonperformance of Contract for Medical Services Held Justified.

1. The fact of plaintiff's speedy relief when finally she was able to get medical assistance *held* to justify inference that she suffered

physical pain through nonperformance by defendant of its contract to furnish her medical and hospital service. (Coffey v. Northwestern Hospital Assn., 100.)

Damages—Mental Suffering With Physical Pain Element of Damage.

2. Mental anguish concomitant with physical pain suffered through breach of contract to furnish medical and hospital service is an element of damages. (Coffey v. Northwestern Hospital Assn., 100.)

Damages—Mental Suffering as Element of Damage Held Within Contemplation of Parties to Contract for Medical Care.

3. That a resort to charity, with accompanying humiliation and mental anguish, might result to plaintiff from failure of defendant to keep its contract to furnish plaintiff medical and hospital services in case of sickness was a contingency naturally within the contemplation of both parties. (Coffey v. Northwestern Hospital Assn., 100.)

Damages—Where Damages Uncertain Contract Fixing Reasonable Amount for Delay is Valid.

4. A provision in a contract for the construction of municipal improvements that for each day's delay in completing the improvement the contractor should as liquidated damages pay to the city \$10 is valid and enforceable, for the amount of damage would be practically incapable of computation, and hence the provision could not be treated as penalty. (Star Sand Co. v. Portland, 323.)

Damages—Trespass—Evidence—Question for Jury as to Amount of Damages.

5. Where defendant's sheep, and those of other parties, trespass upon plaintiff's land, and damage it by eating the grass and bedding upon it, the approved practice is to leave the question as to the amount of the damage done by defendant's sheep to the good sense of the jury as reasonable men to form from the evidence the best estimate that can be made under the circumstances. (Brown v. McCloud, 549.)

Damages—Witnesses—Approximate Estimates.

6. It is not a sufficient reason for disallowing damages claimed that they cannot be exactly calculated, it being sufficient that from approximate estimates of witnesses a satisfactory conclusion can be reached. (Brown v. McCloud, 549.)

See Eminent Domain, 2, 3.

See Trial, 8.

Damages for Trespassing by Sheep.

See Animals, 1, 2.

Verdict as to Damages in Ejectment Suit Held Conclusive.

See Appeal and Error, 12.

Owner Entitled to Damages for Constructing and Maintaining Fences Made Necessary.

See Eminent Domain, 1.

Cannot be Allowed Without Allegation in Alternative Writ.

See Mandamus, 2.

Evidence Admissible in Mitigation.

See Sales, 5.

DEATH.

Death—Statute Makes County Liable for Death from Defective Highway Bridge; "Pari Materia."

1. Section 6375, L. O. L., giving right of action against county to one injured by defective highway or bridge thereon, being a legal county road, with the earlier statute, Section 380, giving right of action for death where, had the person lived, he might have maintained an action for injury done by the same wrongful act or omission, gives right of action for death from such a defective bridge; the statutes being in *pari materia*, that is, relating to the same thing or subject, though enacted at different times. (Coates v. Marion County, 334.)

DECLARATIONS.

Declarations by Accused as to Position in Firing.

See Homicide, 2.

Authority is not Provable by Declarations.

See Principal and Agent, 2.

DEEDS.

Instrument in Form of a Deed, in Reality a Mortgage.

See Mortgages, 1, 2.

Conveyance by Trustee After Death of Donor.

See Trusts, 2.

Oral Agreement to Hold Land Subject to Conveyance When Ordered.

See Trusts, 1.

DELIVERY.

See Evidence, 12.

See Sales, 1-4.

DEMURRER.

Objection That Complaint Stated Two Offenses Held not Raised by Demurrer.

See Criminal Law, 1.

Failure of Record to Show Disposition of Demurrer, not Ground for Reversal.

See Criminal Law, 2.

DENTISTS.

See Physicians and Surgeons, 1-3.

DEPARTURE.

Reply Alleging Waiver of Stipulation in Contract Sued on Held a Departure.

See Pleading, 2.

Reply Alleging Adverse Possession No Departure from Complaint Alleging Appropriation.

See Pleading, 6.

DISCRETION OF COURT.

See Evidence, 7.

See Pleading, 3-5.

See Trial, 5, 6.

DISCRETION OF LEGISLATURE.

See Constitutional Law, 1.

DISMISSAL AND NONSUIT.

See Appeal and Error, 1.

Motion for Nonsuit Admits Truth of Evidence.

See Trial, 4.

DISTRICT ATTORNEY.

False Assumption in Argument of District Attorney.

See Criminal Law, 8, 10.

DIVORCE.

Divorce—Evidence—Sufficient to Show Personal Indignities.

1. Where defendant had frequently stated with profanity that he did not care for plaintiff and had refused to permit her to return home after she went to take care of his sick mother, the charge of personal indignities rendering life burdensome, which is ground for divorce under Section 507, L. O. L., was sustained. (Steele v. Steele, 630.)

Divorce—Grounds—Personal Violence Unnecessary to Constitute "Personal Indignities."

2. To constitute personal indignities which are a ground for divorce under Section 507, L. O. L., it is not necessary that there be actual personal violence or attempt at personal violence. (Steele v. Steele, 630.)

Divorce—Custody of Children—Defendant Earning \$50 per Month Required to Pay \$15 per Month for Support of Daughter.

3. Where plaintiff had been awarded a divorce with custody of her 14-year old daughter, but it appeared that defendant had no property except his earnings, and that he was in poor health and capable of earning only about \$50 per month, he will be required to pay \$15 per month for the support of the daughter. (Steele v. Steele, 630.)

DOMICILE.

Of Owner Prima Facie Situs of Personalty for Taxation.

See Taxation, 9.

DOUBLE MILEAGE.

Witnesses may Demand Fees in Advance.

See Costs, 1.

See Witnesses, 2.

DOWER.

Contract as to Dower Between Husband and Wife Void.

See Curtesy, 1-4.

EASEMENTS.

Easements—Sewer Easement by Instrument not Recorded is not Binding on Purchaser Without Notice.

1. In an action for damages for obstruction of a sewer, alleging defendants maintained a connection with plaintiffs' sewer on plaintiffs' land without authority, a writing by plaintiffs' grantor, giving defendants such authority, but not executed with the formality of a deed, was not entitled to record, and, not being recorded, the easement, right or equity ended with plaintiffs' purchase, unless purchasers had notice of the easement, and the burden was on defendants to prove such notice. (Chevchuk v. Kotchik, 181.)

EJECTMENT.

Ejectment—Verdict for Plaintiff must be Directed When Ownership in Fee Simple is Admitted.

1. Where in ejectment a cause of action for the recovery of the possession of realty without damages is stated, and it is admitted by the pleadings that plaintiff was the owner in fee simple of the property, a verdict for plaintiff should have been directed, since such title includes the right to possession in the absence of a showing to the contrary by the pleadings, in view of Section 328, L. O. L., providing that a defendant shall not be allowed to give in evidence any estate in himself or another in the property or any license or right to possession thereof unless the same be pleaded in his answer. (Pacific Livestock Co. v. Portland Lbr. Co., 567.)

Verdict as to Damages in Ejectment Suit Held Conclusive.

See Appeal and Error, 13.

Against Railroad not Barred by Acts of Plaintiff's Predecessor in Interest.

See Estoppel, 1.

Evidence Held not to Show That Contract Failed to Include Premises Involved in Ejectment.

See Reformation of Instruments, 1.

ELECTION.

See Waters, 9.

EMINENT DOMAIN.

Eminent Domain—Owner Entitled to Damages for Constructing and Maintaining Fences Made Necessary.

1. Where by condemning a road lands were divided, so that it was necessary for the owner to fence both sides, he is entitled to damages not only for the expense of constructing the fence but for maintaining the same. (Tillamook County v. Johnson, 623.)

Eminent Domain—In Condemnation Proceeding Defendant must Specify the Damages Which He Seeks to Prove.

2. In proceeding to condemn land for public road, defendants should specify in their answer the damages which will result, and evidence of damage not so specified is inadmissible. (Tillamook County v. Johnson, 623.)

Eminent Domain—Instruction Limiting Damages to That Specified in the Answer Held Harmless.

3. In eminent domain proceedings, instruction which limited the damages to that specified in the answer was harmless, though erroneous; evidence of damages not specified having been received. (Tillamook County v. Johnson, 623.)

ENTRYMAN.

Grantee of Original Entryman may Relinquish.

See Public Lands, 4.

EQUITABLE ESTATE.

Courtesy in Notwithstanding Statute.

See Courtesy, 1-4.

EQUITABLE RELIEF.

See Trial, 9.

EQUITY.

See Appeal and Error, 2.

See Insurance, 2.

Equity will Recover Amount Expended by Guardian in Support of Incompetent from Grantee of Land Agreeing to Support the Incompetent for Life.

See Guardian and Ward, 1.

Equity will Create Lien on Property to Carry Out Contract to Support Third Person.

See Liens, 1.

ESTATES.**Estates—"Estate in Fee" Defined.**

1. An "estate in fee" is every estate which is not for life, for years or at will. (Chance v. Weston, 390.)

ESTOPPEL.**Estoppel—Ejectment Against Railroad Held not Barred by Acts of Plaintiff's Predecessor in Interest.**

1. In ejectment by a land owner against a lumber company which had constructed a railroad over the premises under alleged authority from plaintiff's predecessor in interest in consideration of the transportation of certain logs, plaintiff was not estopped by such action of his predecessor in interest in the absence of evidence that the former owner had knowledge before the building of the road that it traversed the particular tract in question. (Pacific Livestock Co. v. Portland Lbr. Co., 567.)

EVIDENCE.**Evidence—Testimony as to Entries by Deceased in His Account-book Admissible.**

1. Under Section 790, L. O. L., parol evidence that entries in the book of accounts of an attorney were in his handwriting was admissible in an action by his executrix to recover for services rendered. (O'Day v. Spencer, 73.)

Evidence—Presumption of Receipt of Mailed Letter.

2. There is a strong presumption that a letter or postal card marked and addressed to defendant, and mailed by plaintiff, was received by the defendant, and whether this presumption was overcome by defendant's evidence was a question of fact for the jury. (Coffey v. Northwestern Hospital Assn., 100.)

Evidence—Statements of Ancestor Admissible Against Heir Claiming Under Him by Descent.

3. Statement of deceased on supplementary proceedings against him, that he had settled with his partners and received all his interest in the partnership, is admissible against his heir suing for a partnership accounting, under the rule that when admissions of an ancestor would be admissible against him, if living, they are admissible against an heir claiming under him by descent. (Moore v. Moore, 134.)

Evidence—Perishable Character of Potatoes Matter of Common Knowledge.

4. It is a matter of common knowledge that potatoes are a perishable product, not lasting over one season. (Hurst v. Hill, 311.)

Evidence—That Auto has Current Number-plate Evidence of Compliance With Motor Vehicle Law.

5. The motor vehicle law providing for number-plate being attached to a car as evidence that the law has been complied with,

evidence of a car being so equipped with a plate for the current year is admissible without other evidence of a license being issued. (Coates v. Marion County, 334.)

Evidence—Presumption That Law has Been Obeyed Prevents Nonsuit and Directed Verdict.

6. The statutory disputable presumption, declared by Section 799, subdivision 34, L. O. L., that the law has been obeyed, is, by provision of Section 793, evidence, and so prevents nonsuit and directed verdict. (Coates v. Marion County, 334.)

Evidence—Admitting Evidence of Experiments Rests Largely in Court's Discretion.

7. In an action for breach of warranty of variety of wheat sold as seed for spring planting, defendant's evidence that another purchased and planted some of the same lot of wheat and it produced no crop was evidence of an experiment, the admission of which rested largely in the discretion of the trial court to determine whether the conditions of the experiment were similar to those of the case in issue. (Horn v. Elgin Warehouse Co., 403.)

Evidence—Excluding Plaintiff's Evidence of Unsuccessful Planting Held Proper, Though Defendant Showed Successful Planting.

8. In an action for breach of warranty that wheat purchased for seed was a spring wheat variety, evidence that plaintiff's witness purchased some of the same lot of wheat, and it produced no crop, was properly excluded, because the conditions were not shown to be the same; though defendant's testimony that others sowed some of the wheat, and it produced a crop of the variety specified, was admissible. (Horn v. Elgin Warehouse Co., 403.)

Evidence—Technical Meaning of Contract Notwithstanding Presumption.

9. Under Section 718, L. O. L., evidence is admissible to show that the terms of a written contract have a technical, local, or peculiar significance, notwithstanding the presumption that words are used in their primary and general acceptance. (McDonald v. Supple, 486.)

Evidence—Contract—Parol Evidence to Supply Omitted Term.

10. Under Section 713, L. O. L., it is competent to introduce testimony to supply those terms actually agreed upon by the parties to a written contract, but not contained in nor conflicting with an incomplete written contract. (McDonald v. Supple, 486.)

Evidence—Contract—"F. O. B. Cars"—Fabricated.

11. In an action on contract for the erection of barges out of fabricated steel, evidence that the steel was not painted, so that the numbers wore off before receipt, was admissible, as well as evidence as to the meaning of the terms "f. o. b. cars," "fabricated," etc. (McDonald v. Supple, 486.)

Evidence—Contract—Time—Delivery of Steel.

12. In an action for additional compensation on a contract for the construction of steel barges out of fabricated steel, evidence as

to the time of delivery of the steel was admissible, though not specified in the contract. (McDonald v. Supple, 486.)

Evidence—Bills and Notes—Parol Agreement Limiting Liability.

13. A parol agreement at time of execution of a note that the payee will rely on the mortgage executed by the maker, and not assert any personal liability against the maker, is invalid, and cannot be successfully asserted to vary terms of note. (McFarland v. Hueners, 579.)

Evidence—Presumption—Executive Board—Civil Service Commission—Good Faith.

14. It must be assumed that the executive board of a city and its civil service commission acted in good faith for the best interests of the police force and of the public in removing a police officer. (Cole v. Portland, 645.)

See Adverse Possession, 1.

See Attorney and Client, 1, 2.

See Banks and Banking, 1.

See Charities, 2, 3.

See Contracts, 9.

See Corporations, 3.

See Damages, 5.

See Divorce, 1.

See Fish, 8.

See Insane Persons, 2.

See Master and Servant, 1.

See Municipal Corporations, 12.

See Sales, 5-7.

See Waters, 7, 12.

See Witnesses, 1.

See Vendor and Purchaser, 3.

Opinion Evidence as to Value of Attorney's Services not Binding.

See Appeal and Error, 20.

Verdict on Conflicting Evidence not Disturbed.

See Appeal and Error, 10, 14.

Evidence of Other Accidents at Same Point Competent.

See Bridges, 2.

Of Arrangement in Defendant's Absence not Hearsay.

See Criminal Law, 3.

Of Other Crime Showing Identity.

See Criminal Law, 4.

Threats Admissible in Evidence.

See Homicide, 1.

Sufficient to Sustain Conviction of Manslaughter.

See Homicide, 6.

Held not to Show Deed a Mortgage.

See Mortgages, 1.

That Defendant's Son Acted for Himself is Admissible.

See Principal and Agent, 1.

Held, not to Show That Contract Failed to Include Premises Involved in Ejectment.

See Reformation of Instruments, 1.

Differences in Inferences from Evidence for Jury.

See Trial, 4.

EXCEPTIONS, BILL OF.

Exceptions, Bill of—Transcript of Evidence must be Certified by Trial Judge.

1. A transcript of the evidence cannot be considered as a bill of exceptions, unless certified by the trial judge. (*Astoria v. Zindorf*, 332.)

See Appeal and Error, 9.

EXECUTIVE BOARD.

See Evidence, 14.

See Municipal Corporations, 11, 12.

EXEMPLARY DAMAGES.

See Trial, 8.

FINDINGS.

See Appeal and Error, 24.

See Municipal Corporations, 12.

Of Court Sitting Without Jury have Effect of Verdict.

See Appeal and Error, 4.

Only Sufficiency of Findings Reviewable Without Bill of Exceptions.

See Appeal and Error, 9.

As to Reasonableness of Rates Contrary to Evidence.

See Carriers, 3.

General Verdict Controls Unless Special Finding is Inconsistent.

See Trial, 7.

FISH.

Fish—Law Applicable to Fish Applies to Crabs.

1. Crabs are fish, and the law applicable to fish is applicable to crabs. (*State v. Savage*, 53.)

Fish—Property Rights in Fish in State for Benefit of Citizens.

2. The title to migratory fish *feræ naturæ*, while in a state of freedom, so far as a right of property can be asserted, is in the

state, not as a proprietor, but in its sovereign capacity, for the benefit of and in trust for citizens of the state in common. (State v. Savage, 53.)

Fish—Restriction as to Catching in Certain Season or for Years or for Sale, Valid.

3. Legislature has the power to enact laws prohibiting the catching of fish or the killing of game for a certain term of years, or for a certain portion of the year, or in certain localities, where the conditions are different from those in other portions of the state, or for purposes of sale, or may restrict quantity of fish or game that may be caught or killed. (State v. Savage, 53.)

Fish—Statute Prohibiting Taking Salt-water Crabs in Certain County Constitutional.

4. Section 5360, L. O. L., prohibiting the taking of salt-water crabs from Coos County for purpose of sale, as it exists apart from the void amendments of 1915 and 1917, is an equal law, and is valid, since it confers equal rights on all citizens, subjects them to equal burdens, and imposes equal penalties on those who violate it. (State v. Savage, 53.)

Fish—Held in Trust by the State for the People.

5. In so far as fish in streams of the state can be said to be property, they are held by the state in trust for the people. (State v. Blanchard, 79.)

Fish—Courts Should not by Technical Construction Overthrow System of Statutory Legislation of Fishing Industry.

6. In view of the magnitude and productiveness of the fishing industry, the courts should not, by narrow construction of constitutional provisions, destroy the statutory system regulating the fishing industry. (State v. Blanchard, 79.)

Fish—"Set-net" and "Drift-net" Defined.

7. Within the Oregon statutes limiting fishing rights and regulating the use of nets, the term "drift-net" means a net with both ends free to drift with the current, while a "set-net" is one fastened at one or both ends, so the whole net cannot drift with the current, and notwithstanding this be in a condition to take fish. (State v. Blanchard, 79.)

Fish—Evidence Held to Show That Defendant Operated Set-net Over More Than One Third of a Stream.

8. In a prosecution for unlawfully operating a set-net, evidence held to show that defendant operated such a net, and that it extended more than one third the distance across the body of water, in violation of Laws of 1915, page 60. (State v. Blanchard, 79.)

Fish—State has Power to Regulate Fisheries.

9. Within the limits prescribed by the Constitution, the state in the exercise of its police power and for the welfare of all its citizens can regulate catching of fish in the waters of the state, or those over which the States of Oregon and Washington have concurrent jurisdiction. (Williams v. Seuffert Bros. Co., 163.)

Fish—Statutory Requirement That Location License must be Renewed as Early as April 1st is Reasonable.

10. The requirement of Laws of 1915, page 226, Section 2, that one holding a license to fish with a fixed appliance shall at some date, as early as April 1st of any year, make application for renewal in order to retain the location is a reasonable one. (Williams v. Seuffert Bros. Co., 163.)

Fish—Failure to Renew in Time License for Location for Fixed Appliance in Columbia River is an Abandonment of the Location.

11. Under Laws of 1913, page 225, Section 1, forbidding issuance of license for a location in Columbia River for fishing with a fixed appliance which would interfere with a prior location, and Laws of 1915, page 226, Section 2, making the failure to renew a license for location for fixed appliance by April 1st of any year an abandonment of the location, the failure to renew a license is an abandonment of the location to another who had license issued for the same location on April 1st, regardless of any prior use of such location. (Williams v. Seuffert Bros. Co., 163.)

Fish—Decision of Fish and Game Commissioner will not be Reversed by Courts Where Facts Warrant the Action Taken.

12. A decision of the fish and game commissioner deciding question of priority as to fishing rights will not, in view of the obvious intention of the legislature to invest the commission with discretionary power, be disturbed where the facts and circumstances warranted the determination made. (Williams v. Seuffert Bros. Co., 163.)

Different Regulations for Fishing in Different Counties not Local Law.

See Statutes, 4.

FISH AND GAME COMMISSION.

See Constitutional Law, 1.

See Game, 1, 2.

Decision of will not be Reversed Where Facts Warrant the Action Taken.

See Fish, 12.

FORECLOSURE.

Foreclosure of Contract.

See Appeal and Error, 25.

FORFEITURE.

See Specific Performance, 3.

FRAUD.

See Bills and Notes, 2.

See Public Lands, 1, 2.

See Vendor and Purchaser, 4.

FRAUDS, STATUTE OF.

See Statute of Frauds.

GAME.**Game—Commission Vested With Discretionary Power to Expend License Fees.**

1. It was the evident intent of the legislature by Laws of 1915, Chapter 287, Section 11, paragraph "h," to invest the fish and game commission with a discretionary power to protect and propagate game within the state and to expend, subject to legislative approval, the money derived from fees and licenses. (Holmes v. Olcott, 33.)

Game—Commission Empowered to Purchase Farm for Propagation of Chinese Pheasants.

2. The purchase of a farm for the propagation of Chinese pheasants is germane to and within the purview of Laws of 1915, Chapter 287, authorizing the fish and game commission to expend money for the protection and propagation of game, etc. (Holmes v. Olcott, 34.)

GIFTS.**Gift by Father to Daughter.**

See Adverse Possession, 1, 2.

GOOD FAITH.

See Evidence, 14.

GUARANTY.**Guaranty—Contract—"Purchase"—"Transfer."**

1. Where a company contracted to sell goods on credit at wholesale to a buyer reselling the same in certain territory, and the buyer with the company's approval accepted from another buyer from it under a similar contract goods in his possession not paid for, and authorized the company to charge him with the amount of the invoice price thereof, he obtained title thereto, by transfer from the other buyer, who had absolute title, and not by purchase from the company, within the terms of a guaranty of payment for goods purchased under the contract; a "transfer" being an act or transaction by which property of one person is by him vested in another. (W. T. Rawleigh Co. v. McCoy, 474.)

Guaranty—Liability—Compensation—Construction.

2. Liability of guarantors without hire or compensation is strictly construed. (W. T. Rawleigh Co. v. McCoy, 474.)

GUARDIAN AND WARD.**Guardian and Ward—Guardian Entitled in Equity to Recover Amount Expended in Support of Incompetent from Grantee of Land Agreeing to Support the Incompetent for Life.**

1. Where a mother conveyed land to certain children in consideration of their promise to support after her death an incompetent

child, and during her life the mother releases them from the promise, and after her death a guardian appointed for the incompetent person in good faith brings an action to set aside the release, and in such proceeding learns for the first time that the grantees had orally agreed at the time of the release to support the incompetent, defendants affirmatively alleging such oral contract and their readiness to comply therewith, the guardian should receive a reasonable compensation for support of the incompetent while under his care, and until the grantees again assume his care and support. (Murphy v. Whetstone, 293.)

See Insane Persons, 1, 2.

HARMLESS ERROR.

Subjunctive Instructions Based on Hypothetical Conditions Held Harmless.

See Appeal and Error, 7.

Instruction Limiting Damages to That Specified in the Answer Held Harmless.

See Eminent Domain, 3.

Harmless Error in Refusal of Instructions.

See Homicide, 3.

HEARSAY EVIDENCE.

See Criminal Law, 3.

HIGHWAYS.

Highways—Statute Protecting Persons Supplying Public Contractor Should be Liberally Construed.

1. A statute enacted to protect persons supplying a contractor performing a public work with labor or materials for any portion of the work provided for should be given a liberal construction in order to carry out the legislative intent. (Clatsop County v. Fidelity & Deposit Co. of Maryland, 2.)

Highways—Person Supplying Meats to Subcontractor on Public Work Held a Furnisher of "Labor and Materials" Within Contractor's Bond.

2. Meats used in a necessary boarding camp for laborers employed on a public highway in a sparsely settled region provided for in a contract secured by bond pursuant to Section 6266, L. O. L., as amended by Laws of 1913, page 59, are included within the terms "labor and materials," and the person furnishing them to a subcontractor protected by the statutory bond. (Clatsop County v. Fidelity & Deposit Co. of Maryland, 2.)

Highways—Evidence Held to Show Necessity of Boarding Camps on Public Work Entitling One Supplying Meat to Sue on Contractor's Bond.

3. In action on bond of contractor for public work given pursuant to Section 6266, L. O. L., as amended by Laws of 1913, page 59, brought by one who furnished meats to a boarding camp for

laborers maintained by subcontractor, evidence *held* to support requested finding that it was necessary for prosecution of work that subcontractor maintain boarding camp at each of his construction camps; region being sparsely settled. (Clatsop County v. Fidelity & Deposit Co. of Maryland, 2.)

HOMICIDE.

Homicide—Threat Admissible in Evidence Though not Directed Especially to Deceased.

1. In a prosecution resulting in conviction of manslaughter, testimony of decedent's father that about eight months before the shooting defendant had said to him that, if he could not beat them any other way, he would do it with a Winchester, *held* admissible as a threat over objection that it was not directed especially toward deceased and was too remote; such threat having reference to a controversy about a road pursuant to which decedent was subsequently killed. (State v. Butler, 219.)

Homicide—Declarations by Accused as to Position in Firing.

2. In a prosecution resulting in conviction of manslaughter, testimony of a deputy sheriff as to where defendant showed him he was when he fired the last shot at decedent, and about how far the place was from the panel in his fence, open on account of a road, which he had been putting up nightly, so that decedent with others had volunteered to watch for him, also how far the place was from that where empty shells were found, *held* admissible. (State v. Butler, 219.)

Homicide—Harmless Error in Refusal of Instruction.

3. In a prosecution resulting in conviction of manslaughter, the refusal to defendant of his requested instruction referring to malice and ill will *held* harmless to him in view of the verdict negating the existence of malice or ill will on his part. (State v. Butler, 219.)

Homicide—Killing Manslaughter Unless Justifiable or With Malice or Deliberation.

4. Every killing is manslaughter unless it is justifiable or excusable, or is accompanied by malice or deliberation, when it becomes murder in the first or second degree. (State v. Butler, 219.)

Homicide—Killing in Anger Without Excuse or Justification is Manslaughter.

5. If defendant under provocation of a sudden attack grew angry and killed decedent without real or apparent necessity, the killing was not justifiable or excusable, and defendant was properly convicted of manslaughter. (State v. Butler, 219.)

Homicide—Evidence Sustaining Conviction of Manslaughter.

6. In a prosecution resulting in conviction of manslaughter, defendant having shot and fatally wounded decedent, who was watching a road through defendant's land to see if he was the one who was putting up an obstructing fence every night, evidence *held* sufficient to sustain the verdict. (State v. Butler, 219.)

Homicide—Instruction on Threats not Abstract.

7. In a prosecution resulting in conviction of manslaughter, instruction as to the consideration of threats made by defendant against decedent in determining defendant's intent and malice *held* not erroneous as abstract; there being some evidence of threats. (State v. Butler, 219.)

Homicide—Instruction on Self-defense.

8. In view of Sections 1371, 1909, 1914, L. O. L., in a prosecution resulting in conviction of manslaughter, instruction on self-defense *held* not erroneous in its limitation of defendant's right to take his adversary's life only to cases of threatened deadly harm or severe calamity "felonious" in character; the word "felonious" having been used as synonymous with great bodily injury. (State v. Butler, 219.)

See Criminal Law, 2-10.

HORSE FEED.

See Municipal Corporations, 1-4.

IMPLIED CONTRACT.

See Pleading, 3.

See Work and Labor, 1.

IMPLIED WARRANTY.

See Sales, 8.

INDICTMENT.**Indictment and Information—Indorsement of Statute Supposedly Violated Adds Nothing.**

1. Indorsement on a complaint of the statutes supposedly violated adds nothing, and is not even required. (State v. Blanchard, 79.)

INJUNCTION.**Injunction—Officers—Enforcing Void Statute may be Restrained.**

1. The general rule is that a court of equity is without jurisdiction to restrain by injunction the enforcement of criminal proceedings, the exception being that, where public officers are undertaking to enforce a void statute, injunction will lie against them, though not against the state. (Nault v. Palmer, 538.)

INSANE PERSONS.**Insane Persons—Guardian of Incompetent—Petition Need Only Follow Statute.**

1. Petition for appointment of guardian for an alleged incompetent is sufficient if it follows substantially the wording of Section 1319, L. O. L., and it is not necessary to allege all facts and details tending to show the individual is incapable of conducting his own affairs. (McIlroy v. McIlroy, 468.)

Insane Persons—Evidence—Guardian and Ward—Incompetency.

2. On a son's petition, under Section 1319, L. O. L., for appointment of guardian for his ninety-one year old father, evidence held to show that the father was incapable of conducting his own affairs, and to call for guardianship to manage and preserve the estate. (McIlroy v. McIlroy, 468.)

INSTRUCTIONS.

See Trial, 8.

Exceptions to Instructions.

See Appeal and Error, 6.

Subjunctive Instructions Based on Hypothetical Condition Held Harmless.

See Appeal and Error, 7.

One cannot Complain of too Favorable Instruction.

See Appeal and Error, 8.

Argumentative Instruction on Self-defense Properly Refused.

See Criminal Law, 5.

Court not Required to Follow Language of Requested Instruction.

See Criminal Law, 6.

Instructions must be Read Together.

See Criminal Law, 7.

Court Urging Jury to Agree Held not Erroneous as Coercive.

See Criminal Law, 9.

Instruction Limiting Damages to That Specified in the Answer Held Harmless.

See Eminent Domain, 3.

Instructions on Self-defense.

See Homicide, 8.

Instruction on Threats not Abstract.

See Homicide, 7.

As to Signing of Contract not Erroneous in View of Other Instructions.

See Trial, 1.

Requested Instruction not Based on Evidence Properly Refused.

See Trial, 2.

Refusal of Instructions Covered by Those Given Proper.

See Trial, 3.

INSURANCE.

Insurance—Payment of Cash Surrender Value of Policy upon False Affidavit as to Death of Beneficiaries to Whom Paid-up Policy had been Issued Held Ineffective to Invalidate Paid-up Policy.

1. Where insurer issued paid-up policy, stipulating that the consideration had been paid by beneficiaries, and agreeing to pay to beneficiaries specified amount upon death of insured, and where insured subsequently delivered policy to insurer upon receipt of the cash surrender value of the policy, upon insured's false affidavit that the beneficiaries were dead, the transaction was ineffective to surrender or cancel the policy. (Burr v. Mutual Life Ins. Co., 14.)

Insurance—Equity will not Revive Policy Wrongfully Surrendered to Insurer, Remedy at Law Being Adequate.

2. Where insurer issued paid-up policy, stipulating that the consideration had been paid by beneficiaries, and agreeing to pay specified amount upon death of insured, and where insured subsequently delivered policy to insurer upon receipt of the cash value of the policy, upon insured's false affidavit that the beneficiaries were dead, equity had no jurisdiction of suit to restore and revive the policy, since the transaction did not operate to surrender or cancel the policy, and since, the policy being in force, the beneficiaries had a complete and adequate remedy at law. (Burr v. Mutual Life Ins. Co., 14.)

INTENT.

Of Testator Derived from Instrument Controls.

See Wills, 1.

IRRIGATION DISTRICTS.

See Waters, 13-20.

JOINT PURCHASERS.

Presumption as to Interest of Joint Purchasers

See Vendor and Purchaser, 2.

JUDGMENT.

Judgment—Waters—Water Rights—Priorities—Binding on Parties to Litigation.

1. A decree fixing the rights and priorities of parties to a litigation over water rights did not affect other users of the waters of the river and its tributaries who were not parties to the suit, so that it was competent for the water board subsequently, on proper petition, to determine the rights and priorities of all users of the water system. (Nault v. Palmer, 538.)

See Appeal and Error, 16-18, 23.

See Chattel Mortgages, 2.

Nonappealing Party cannot Support Judgment by Claim of Error in Trial Court's Ruling.

See Appeal and Error, 12.

Discrepancy in Date of Judgment.

See Appeal and Error, 16, 18.

Evidence Sufficient to Sustain Judgment in Action for Legal Services.

See Attorney and Client, 2.

Statute Satisfied if Judgment will Protect Defendant Against Future Action.

See Parties, 1.

JURISDICTION.

See Waters, 15.

JURY.**Jury—Defendant Entitled to Jury Trial on Appeal to Circuit Court Notwithstanding Small Amount Involved.**

1. On an appeal to the Circuit Court from the District Court, defendant was entitled to a jury trial under Article I, Section 17, and Article VII, Section 3, of the Constitution, though the controversy involved only \$37.50. (Schnitzer v. Stein, 343.)

Jury—Right to Jury Trial may be Regulated by Statute Within Certain Limits.

2. The exercise of the constitutional right of trial by jury may within well-defined limitations be regulated by statute. (Schnitzer v. Stein, 343.)

General Verdict Controls Unless Special Finding is Inconsistent.

See Trial, 7.

LABOR.

See Work and Labor.

LANDLORD AND TENANT.**Landlord and Tenant—Tenant Forfeiting Lease and Improvements Liable for Rent.**

1. A tenant leasing and improving property *held* liable for rent due at time of forfeiture by reason of failure to pay rent, the lease providing that the lessor could terminate for such reason "without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant," and that improvements became the property of lessor immediately upon construction. (Gearin v. Rothchild Bros., 351.)

LATENT AMBIGUITY.

See Charities, 1, 3.

LEASE.**Tenant Forfeiting Lease Liable for Rent.**

See Landlord and Tenant, 1.

LIABILITY.

See Guaranty, 2.

Release from for Breach of Contract Good Consideration.

See Bills and Notes, 1.

Liability of County for Death from a Defective Bridge is Question for Jury.

See Bridges, 1, 3.

Parol Agreement Limiting Liability.

See Evidence, 13.

LICENSE FEES.

Appropriation of Moneys and License Fees for Protection of Game.

See Constitutional Law, 1.

See States, 1-3.

Statutory Requirement as to Renewal of Location License.

See Fish, 10, 11.

Commission Vested With Discretionary Power to Expend License Fees.

See Game, 1.

Commission Empowered to Purchase Farm for Propagation of Chinese Pheasants.

See Game, 2.

LICENSES.

See Physicians and Surgeons, 1-3.

LIENS.

Lien—Equity will Create Lien on Property to Carry Out Agreement to Support Third Person.

1. Where a conveyance of property is made in consideration of the future support of a third person, upon a breach of the conditions by the grantee, equity will then create a lien or charge on the property to carry out the spirit and intent with which the conveyance was made. (Murphy v. Whetstone, 293.)

MANDAMUS.

Mandamus—Taxation—Writ may Issue to Compel Acceptance of Tax—Sheriff cannot Prevent Contest of Road Tax by Refusing to Accept Other Taxes Without Road Tax.

1. Sheriff and tax collector of county is not entitled to refuse timely tender by owner of realty of state and county taxes, a school district tax, a port tax, and a fire-patrol tax, because taxpayer did not also tender amount charged as tax by road district

for the year, and taxpayer, entitled to contest illegal tax, can have *mandamus* to compel sheriff to receive payment. (Central Pac. Ry. Co. v. Gage, Sheriff, 192.)

Mandamus—Damages cannot be Allowed Without Allegation in Alternative Writ.

2. Under Section 620, L. O. L., giving pleadings in *mandamus* same effect and the same construction as other pleadings, an applicant for *mandamus* cannot recover damages where there was no allegation in the alternative writ that she had been damaged. (Taggart v. School Dist. No. 1, 422.)

MANSLAUGHTER.

Unless Justifiable or With Malice or Deliberation.

See Homicide, 4.

Killing in Anger, Without Excuse or Justification.

See Homicide, 5.

MASTER AND SERVANT.

Master and Servant—Evidence—Contract—Avoidance of Written Resignation—Pleading—Confession and Avoidance.

1. In an employee's action for wrongful discharge, prior to termination of contract, evidence that employee's written resignation and acceptance was at request of the employer and merely for purpose of appearances, was inadmissible, in absence of a plea in confession and avoidance. (Martin v. Gauld Co., 635.)

Master and Servant—Resignation—Cannot Recover for Wrongful Discharge—Contract.

2. An employee, tendering his written resignation, which is accepted by the employer, cannot recover for wrongful discharge prior to termination of contract, though the resignation was at the employer's request and was made merely for the sake of appearances. (Martin v. Gauld Co., 635.)

Master and Servant—Action—Variance.

3. In an action for wrongful discharge, variance between allegation that plaintiff was employed at a fixed salary per month and 10 per cent profits during the year, after deduction of an amount equal to 10 per cent of the capital stock, and proof that he was employed at such a salary, and that it was subsequently agreed that he was to receive the 10 per cent of the profits, *held* not fatal, under Section 97, L. O. L. (Martin v. Gauld Co., 635.)

Master and Servant—"Profits"—Construction—Question for Court.

4. In employee's action for wrongful discharge in violation of contract entitling him to certain per cent of profits, where there was no understanding between the parties as to what should constitute profits, the interpretation of the contract with respect to the meaning of the term "profits" *held* for the court. (Martin v. Gauld Co., 635.)

MATERIAL.

Food for Horses is "Material" Within Meaning of Statute.

See Highways, 1-3.

See Municipal Corporations, 1-4.

MEDICAL SERVICES.

See Contracts, 1-4.

See Damages, 1-3.

MENTAL SUFFERING.

See Damages, 2, 3.

MODIFICATION.

See Contracts, 11.

MORTGAGES.

Mortgages—Evidence Held not to Show Deed a Mortgage.

1. In suit by children of one brother and his wife against children of another brother to have declared a mortgage a deed of a sawmill from plaintiffs' father and mother to defendants' father, evidence *held* insufficient to meet burden imposed by law on a party claiming that an instrument in form a deed is in reality a mortgage. (Jones v. Jones, 197.)

Mortgages—Heavy Burden on Party Claiming Deed a Mortgage.

2. The law imposes a heavy burden of proof on a party who claims that an instrument formally a deed is in reality a mortgage. (Jones v. Jones, 197.)

MOTION.

To Quash Summons not Answer on Merits Amounting to General Appearance.

See Appearance, 2.

MOTOR VEHICLE LAW.

That Auto has Current Number-plate Evidence of Compliance With Motor Vehicle Law.

See Evidence, 5.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Food for Horses Working on Project "Material" Furnished Subcontractor.

1. Food for horses used in the improvement of a street is "material" within the meaning of a bond executed under Section 6266, L. O. L., and Portland City Charter, Section 162, for the protection of subcontractor's materialmen and laborers. (Portland v. New England Casualty Co., 48.)

Municipal Corporations—Complaint on Contractor's Bond for Materials Furnished Sufficiently Showed That Subcontractor Entered upon Work.

2. In an action on the bond of a municipal contractor to recover for feed furnished a subcontractor, complaint *held* to sufficiently aver that the subcontractor entered upon the performance of the work under his contract. (Portland v. New England Casualty Co., 48.)

Municipal Corporations—Furnisher of Horse Feed to Subcontractor Need not Show That All Horses Worked on Project.

3. A furnisher of horse feed to a subcontractor should not be required to watch and see that every bit of the feed supplied by him was fed to horses on the job; and, if some of the feed was used elsewhere, it rests with the bondsman of a municipal contractor to show that fact. (Portland v. New England Casualty Co., 48.)

Municipal Corporations—Whether Horse Feed Furnished was Used in the Work Held for Jury.

4. In an action on the bond of a municipal contractor to recover for horse feed furnished a subcontractor, whether the feed was in fact used by the subcontractor to feed horses used on the work *held* for the jury. (Portland v. New England Casualty Co., 48.)

Municipal Corporations—Property to be Assessed Need not be Described in Initiatory Proceedings.

5. Under City of Roseburg Charter, Sections 73, 115, property to be assessed for a proposed sewer not abutting upon the sewer need not be described in the initiatory proceedings and the owners then notified that their property would be assessed; notice at the assessment stage of the proceeding giving owners opportunity to be heard before assessments are actually made being sufficient. (Giles v. Roseburg, 453.)

Municipal Corporations—Map Showing Property Benefited not Necessary.

6. Under City of Roseburg Charter, map by city engineer showing property to be benefited by sewer improvement is not necessary to the validity of the proceedings, however proper and fitting that such a map be kept on file. (Giles v. Roseburg, 453.)

Municipal Corporations—Property, Though not Abutting on Sewer, may be Assessed.

7. It is not necessary in order to justify an assessment upon property that it actually abuts upon the sewer or be at the time connected therewith. (Giles v. Roseburg, 453.)

Municipal Corporations—Finding of City Council as to Benefits Conclusive.

8. Whether property was benefited by sewer is a question of fact upon which the finding of the city council is conclusive, except under special conditions. (Giles v. Roseburg, 453.)

Municipal Corporations—Sewer District Created—Notice—Property Benefited—Resolution of Intention to Construct Sewer.

9. Council of City of Roseburg was not required to create and define sewer district, or give notice of the property benefited, at time of passing resolution of intention to construct sewer, and was not required to specify in such resolution the property benefited, notwithstanding Roseburg City Charter, Section 111, requiring city engineer or surveyor to file "plans and specifications for an appropriate sewer or drain," and providing that the council "shall declare" its purpose to construct said sewer or drain describing the same and the location thereof"; such provision having reference to plans and specifications, and the location of the sewer itself, and not of the district. (Giles v. Roseburg, 453.)

Municipal Corporations—Negligence of Defendant in Automobile Collision for Jury.

10. In an action by owner of automobile for damages by reason of a collision with defendant's automobile at street intersection, negligence of defendant *held* for the jury. (Whetstone v. Jensen, 576.)

Municipal Corporations—Trial of Policeman—Executive Board—Civil Service Commission—Charter.

11. It is not necessary that a sergeant of police, tried for misconduct, should be arraigned and required to plead before the executive board and the civil service commission, where neither the charter nor rules make any such requirements, since such proceedings are more or less informal and are left somewhat to the discretion of the commissioners. (Cole v. Portland, 645.)

Municipal Corporations—Review—Dismissal of Policeman—Evidence—Sufficiency—Findings.

12. On writ of review as to sufficiency of cause to justify dismissal of police officer by executive board, which was confirmed by civil service commission, where there is any evidence whatever to sustain the findings of the board and commission, the reviewing court cannot inquire into and pass on the facts. (Cole v. Portland, 645.)

NEW TRIAL.

New Trial—Technical Manner of Pleading Ownership not Open on Motion for New Trial.

1. In action for conversion, question as to technical manner of pleading plaintiffs' ownership was not open to defendants on their motion for new trial. (Blaser v. Fleck, 187.)

NOTICE.

See Waters, 14, 18.

Sufficiency of Notice of Appeal.

See Appeal and Error, 15-18.

Of Resolution of Intention to Construct Sewer.

See Municipal Corporations, 9.

Notice of Election of Bonds of Irrigation District.

See Statutes, 6.

OFFICERS.

See Waters, 3.

Restraining Officers Enforcing Void Statute.

See Injunction, 1.

OPINION EVIDENCE.**Opinion Evidence as to Value of Attorney's Services not Binding.**

See Appeal and Error, 20.

OPTION.

See Specific Performance, 3.

OREGON CASES.**Applied, Approved, Cited, Distinguished, Followed and Overruled in This Volume.**

See Table in Front of This Volume.

OREGON CONSTITUTION.**Cited and Construed in This Volume.**

See Table in Front of This Volume.

OREGON STATUTES.**Cited and Construed in This Volume.**

See Table in Front of This Volume.

OWNERSHIP.**When Ownership in Fee Simple is Admitted.**

See Ejectment, 1.

PAROL AGREEMENT.**Limiting Liability.**

See Evidence, 13.

PAROL EVIDENCE.**To Supply Omitted Term.**

See Evidence, 10.

Express Trusts in Land cannot be Proved by Parol Evidence.

See Trusts, 5.

PAROL TRUST.

See Trusts, 1, 2.

PARTIAL PAYMENTS.

See Contracts, 10.

PARTIES.

Parties—Requirement of Real Party in Interest Satisfied, if Judgment will Protect Defendant Against Future Action.

1. Section 27, L. O. L., requiring every action be prosecuted in name of real party in interest, was enacted for benefit of defendant to protect him from being again harassed for same cause, but if not cut off from any just offset or counterclaim against the demand, and if a judgment in behalf of plaintiff will fully protect him when discharged, his concern is at an end. (Blaser v. Fleck, 187.)

Decree Fixing Rights to Water Binding on Parties to Litigation Only.

See Judgment, 1.

PAYMENT.

See Banks and Banking, 1.

PENALTIES.

See Waters, 7.

PERFORMANCE.

Mere Impossibility of Promisor No Excuse for Failure to Perform.

See Contracts, 5.

PERSONAL INDIGNITIES.

See Divorce, 1, 2.

PERSONAL PROPERTY.

Unincorporated Associations may Take and Hold Personal Property.

See Associations, 1.

Jurisdiction for Taxing Purposes of Personal Property.

See Taxation, 1-9.

PHYSICIANS AND SURGEONS.

Physicians and Surgeons—Dentist License; "Practice Dentistry"; "Conduct Dental Office."

1. Dentist who was operating and maintaining a dental office in the state on January 1, 1919, was entitled to a license under Laws of 1919, page 177, Section 1, such statute not conflicting with Section 4777, L. O. L., as amended by Laws of 1919, page 175, pertaining to the right to practice dentistry, the right to conduct a dental office and the right to practice dentistry being separate and distinct, the one not including the other. (State ex rel. v. State Board of Dental Examiners, 529.)

Physicians and Surgeons—Dentists—License to Practice—Necessity for.

2. Under Laws of 1919, page 177, one holding license or privilege only to conduct, manage, or maintain a dental parlor must confine himself strictly to such activities, maintaining an office, having all instruments and appliances, and employing competent dentists, but cannot himself engage in practice of dentistry or examination of patients without being also licensed to practice dentistry. (State ex rel. v. State Board of Dental Examiners, 529.)

Physicians and Surgeons—Dentists—License—Statute.

3. Laws of 1919, page 177, requiring every individual or member of any firm, with certain exceptions, to obtain license to practice dentistry before engaging in conducting or maintaining a dental office or parlor within the state is constitutional. (State ex rel. v. State Board of Dental Examiners, 529.)

PLEADING.**Pleading—Imperfect Statement Cured by a Verdict.**

1. Where the sufficiency of a complaint is not questioned by demurrer, a verdict will cure formal defects, such as an improper statement, or the omission of formal allegations, and establishes every reasonable inference that can be drawn from the facts stated. (Portland v. New England Casualty Co., 48.)

Pleading—Reply Alleging Waiver of Stipulation in Contract Sued on Held a Departure.

2. Where plaintiff alleged performance of contracts for the construction of municipal improvements, and on the city's averment that defendant failed to complete within time, and so was liable under provision for payment of stipulated sum per day as liquidated damages, reply alleging waiver of the provision was a departure. (Star Sand Co. v. Portland, 323.)

Pleading—Amendment—Discretion of Court—Implied Contract.

3. Where the original complaint relied on a supplemental oral agreement modifying a written contract for services in erecting steel dredge-hulls, etc., it was not an abuse of the trial court's discretion to allow plaintiff to file an amended complaint, relying on an implied contract to pay a greater sum; the two causes of action not being inconsistent. (McDonald v. Supple, 486.)

Pleading—Amendment to Answer—Discretion of Court.

4. Allowance of amendment to the answer presenting an absolute new defense, if admissible at all, was within the sound discretion of the trial court. (McFarland v. Hueners, 579.)

Pleading—Refusal to Permit Amendment to Answer—Not Abuse of Discretion.

5. In action on note given for part of price of realty, refusal to permit defendant to amend his answer to present an absolutely new defense held not such an abuse of trial court's discretion as would justify interference by Supreme Court. (McFarland v. Hueners, 579.)

Pleading—Reply Alleging Adverse Possession No Departure from Complaint Alleging Appropriation.

6. Under a complaint alleging appropriation of water, plaintiff could show appropriation upon unoccupied government land or upon private land with consent of the owner, or appropriation by trespass to which title had been perfected by prescription, so that a reply alleging adverse possession merely strengthens the complaint and is not subject of demurrer on the ground of departure. (Allen v. Magill, 610.)

See Trial, 9.

Discrepancy as to Plaintiff and Plaintiffs Held Clerical Errors.

See Appeal and Error, 5.

Allegation That Defendant Retains, Possession Means Detains.

See Chattel Mortgages, 1.

Objection That Complaint Stated Two Offenses Held not Raised by Demurrer.

See Criminal Law, 1.

In Conversion Manner of Pleading Ownership.

See New Trial, 1.

Seeking to Establish Trust Held Founded on Express Trust.

See Master and Servant, 1.

See Trusts, 4.

Stipulation as to Ownership Controls Allegation in Pleading.

See Stipulations, 1.

Insufficient to Confer Right in Water.

See Waters, 2.

POLICEMAN.**Trial and Dismissal of Policeman.**

See Municipal Corporations, 11, 12.

POLICY.**Paid-up Policy Wrongfully Surrendered to Insurer.**

See Appeal and Error, 2.

See Insurance, 1, 2.

Payment of Surrender Value upon False Affidavit.

See Insurance, 1, 2.

PORTLAND, CHARTER OF.

See Cole v. Portland, 645.

See Portland v. New England Casualty Co., 48.

POSSESSION.

See Chattel Mortgages, 2.

Possession for Ten Years Gives Fee-simple Title.

See Adverse Possession, 2.

PRESUMPTIONS.

See Evidence, 14.

As to Items Arising After Statement.

See Account Stated, 1.

Presumption of Receipt of Mailed Letter.

See Evidence, 2.

That Law Has Been Obeyed Prevents Nonsuit and Directed Verdict.

See Evidence, 6.

Technical Meaning of Contract Notwithstanding Presumption.

See Evidence, 9.

Joint Purchasers of Real Property.

See Vendor and Purchaser, 2.

PRINCIPAL AND AGENT.

Principal and Agent—That Defendant Seller's Son Acted for Himself in Buying Potatoes Sold to Plaintiff Admissible.

1. In action for failure to deliver potatoes sold by defendant's minor son, in charge of his store, defendant claiming son had no authority, evidence of son that when he bought potatoes he secured them for himself with his own money *held* admissible to rebut any inference from son's having been in charge of defendant's store that potatoes were defendant's. (Hurst v. Hill, 311.)

Principal and Agent—Authority not Provable by Declarations.

2. The authority of an agent cannot be proved by his own declarations out of court. (Hurst v. Hill, 311.)

Principal and Agent—Purchaser of Timber Held not Agent so as to Bind Seller by Agreement for Construction of Logging Road.

3. Where plaintiff's predecessor in interest sold certain timber to a third party, who was empowered to remove it in any way he chose, a logging company could not contract with such third party after the construction of the road over the land so as to bind plaintiff's predecessor in interest; the third party not being an agent in such respect. (Pacific Livestock Co. v. Portland Lbr. Co., 567.)

Principal and Agent—One Deals With Alleged Agent at His Own Risk.

4. One who deals with another representing himself to be an agent of a third party sought to be bound deals at his peril. (Pacific Livestock Co. v. Portland Lbr. Co., 567.)

PRINCIPAL AND SURETY.**Judgment Against Surety on Dismissal of Appeal.**

See Appeal and Error, 22.

PRIORITIES.**Of Parties Over Water Rights.**

See Judgment, 1.

See Waters, 4-7.

PROCESS.**Process—Service of Summons in One State Does not Give Courts of Other State Jurisdiction.**

1. The courts of one state cannot get jurisdiction by service of summons in another state. (*Beedle v. Stondall Land & Timber Co.*, 590.)

PROFITS.

See Master and Servant, 4.

PUBLIC IMPROVEMENTS.

See Highways, 1-3.

PUBLIC LANDS.**Public Lands—Suspension Pending Investigation of Entry for Fraud Held a "Proceeding Against Entry" Barring Patent.**

1. A homestead entryman's grantee *held* not entitled to a patent where the Secretary of the Interior had ordered the Commissioner of General Land Office to investigate the entry and such official had by order suspended it pending an investigation upon information of fraud, such action having been instituted within two years after issuance of patent to the original entryman, and constituting a proceeding against the entry within Act Cong. March 3, 1891. (U. S. Comp. Stats., §§ 5113, 5116.) (*Neis v. Ebbe*, 151.)

Public Lands—Relinquishment and Proceedings Against Fraudulent Entry Held to Give Land Department Authority to Consider Land Vacant.

2. Where a final receipt had been issued to a homestead entryman and such entryman had granted the land to plaintiff, that the original entryman and plaintiff had relinquished and quitclaimed their interest to the government, which was investigating the entry and had suspended issuance of patent thereto on the ground of fraud, gave the Land Department authority to consider the land vacant, and to allow a homestead entry on the part of a third person. (*Neis v. Ebbe*, 151.)

Public Lands—Refusal to Allow Entry cannot be Taken Advantage of by One Who has Relinquished.

3. Where a homestead entryman's grantee after relinquishment by the original entryman and quitclaim by the grantee to the government procured others to apply for homestead entry on the land,

the refusal of the government to allow such entry could not be taken advantage of by the original entryman's grantee nor reinvest him with any interest in the land. (Neis v. Ebbe, 151.)

Public Lands—Grantee of Original Entryman may Relinquish.

4. An original homestead entryman's grantee can relinquish his claim to the land to the government to the same extent as could the original entryman, and such relinquishment is authorized by the federal statute. (Neis v. Ebbe, 151.)

PUBLIC MONEYS.

Appropriation of.

See States, 1-3.

PUBLIC SERVICE COMMISSION.

See Carriers, 1-7.

QUESTION FOR COURT.

See Master and Servant, 4.

QUESTION FOR JURY.

See Municipal Corporations, 1-4.

Damages for Trespassing by Sheep.

See Animals, 1, 2.

See Damages, 5.

Point of Accident, Relative Liability of County.

See Bridges, 1.

Repairing by County Officials to Show County, and not City Liable.

See Bridges, 3.

Whether Plaintiff Had Chronic Disease Within Contract for Treatment is Question for Jury.

See Contracts, 2.

Negligence of Defendant in Automobile Collision for Jury.

See Municipal Corporations, 10.

Differences in Inferences from Evidence for Jury.

See Trial, 4.

QUIETING TITLE.

See Waters, 2.

Quieting Title—Plaintiffs in Possession Without Title must Account for Rents and Profits.

1. Where plaintiffs' title ceased on the death of their grantor and an interest in the lands passed to defendant by way of executory devise, defendant's demand on plaintiffs in a suit to quiet title to account to defendant for the rents and profits accruing after death of their grantor was improperly denied. (Bilyeu v. Crouch, 66.)

RATES.

See Carriers, 1-7.
See Constitutional Law, 8.

RATIFICATION.

Of Substitute Teacher Irregularly Appointed.
See Schools and School Districts, 8.

REAL PARTY IN INTEREST.

See Parties, 1.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Evidence Held not to Show That Contract Failed to Include Premises Involved in Ejectment.

1. In ejectment based on construction of a logging railroad over plaintiff's land, wherein defendants contended that, by mutual mistake, the contract for construction of the road made between defendant and plaintiff's predecessor in interest failed to include the premises in question, evidence *held* insufficient to prove a mistake authorizing a reformation of the contract. (Pacific Livestock Co. v. Portland Lbr. Co., 567.)

RENT.

Party in Possession Without Title must Account for Rent.
See Quieting Title, 1.

RESCISSION.

See Vendor and Purchaser, 1-6.

RESIGNATION.

See Master and Servant, 2.

REVIEW.

See Appeal and Error, 9, 10.
See Municipal Corporations, 12.

ROSEBURG, CHARTER OF.

See Giles v. Roseburg, 453.

RULES OF COURT.

Cannot Regulate but must Yield to Statute.
See Courts, 1, 3.

Requiring Payment of Jury Fee Before Trial Held to Violate Statute.
See Courts, 2.

SALES.**Sales—Buyer Who Demands Delivery Within Reasonable Time can Enforce Contract.**

1. Where no time for delivery was fixed by contract of sale, if buyer demanded delivery within reasonable time, and was then ready, able, and willing to perform, there being no delivery offered by seller at any other time, buyer would be in position to enforce the contract. (Hurst v. Hill, 311.)

Sales—Demand Necessary to Fix Liability Where Time for Performance not Fixed.

2. Where contract of sale fixes no time for delivery, there can be no default which either buyer or seller can take advantage of until one party or other has made demand for delivery or acceptance. (Hurst v. Hill, 311.)

Sales—Contract not Fixing Time for Delivery Lapses After Reasonable Time Without Demand.

3. If either party to a contract of sale not specifying time for delivery lets a reasonable time expire without demand, the contract lapses, and neither party can enforce performance. (Hurst v. Hill, 311.)

Sales—Five Months' Delay in Demanding Delivery of Potatoes Unreasonable.

4. Five months' delay on the part of the buyer of potatoes and his assignee in demanding delivery should be considered unreasonable as matter of law. (Hurst v. Hill, 311.)

Sales—Evidence That Variety of Seed Sold Would have Produced Crop Next Year Admissible in Mitigation.

5. In an action for breach of warranty that wheat purchased for seeding was a spring wheat, whereas in fact the wheat delivered was a winter wheat, evidence that, if the wheat was of the variety claimed by plaintiff, it would have produced a crop next year, was admissible in mitigation of damages under the general issue. (Horn v. Elgin Warehouse Co., 403.)

Sales—Evidence That Defendant's Foreman Purchased Wheat for Another Held Admissible to Show Alleged Agency.

6. In an action for breach of warranty of wheat sold for seed, where defendants alleged that they sold the wheat merely as agents for a disclosed principal, evidence by defendant's foreman that he bought the wheat for the account of the alleged principal was admissible. (Horn v. Elgin Warehouse Co., 403.)

Sales—Evidence Held not to Show Express Warranty of Variety of Seed Wheat.

7. In an action for breach of warranty of the variety of wheat sold for seed, plaintiff's testimony that he knew defendant was not selling the wheat as seed wheat under the restrictions of law held to warrant the jury in finding there was no warranty of quality or variety, so as to render the rule of caveat emptor applicable. (Horn v. Elgin Warehouse Co., 403.)

Sales—Warranty of Variety of Wheat Seed Held not Implied Where Buyer Inspected it.

8. Where wheat was sold for seed without any express warranty of quality or variety, and the buyer had opportunity to inspect it before he purchased it, a warranty of variety cannot be implied, though the buyer was unable to determine the variety by inspection, in the absence of showing that the seller knew of such inability or practiced fraud on the buyer. (Horn v. Elgin Warehouse Co., 403.)

Sales—General Verdict for Defendant Sustained, Notwithstanding Finding of Undisclosed Agency.

9. A finding by the jury on special issues that defendant's agency for another was not disclosed to plaintiff does not warrant judgment for plaintiff, notwithstanding a general verdict for defendant, where there was evidence from which the jury could find that there was no warranty of the variety of seed wheat for breach of which plaintiff brought his action. (Horn v. Elgin Warehouse Co., 403.)

Sales—Conditional Seller Entitled to Resell for Buyer's Account and Take Possession of Mortgaged Chattels.

10. Conditional seller of tractor by taking possession, selling for buyer, and crediting proceeds on conditional sales note, under the contract did not evidence intention to rescind, but treated contract as in force, though broken by buyer, and is entitled to take possession of chattels mortgaged to it by buyer as additional security, and to hold as compensation for breach of contract. (First Nat. Bank v. Yocom, 438.)

Sales—Conditional Seller Entitled to Recover Balance After Crediting Proceeds of Resale.

11. One remedy in a contract for sale with reservation of title until payment is right on buyer's default to seize and sell property and apply proceeds on price; and, where seller exercises right, he is entitled to recover from buyer any balance remaining after crediting proceeds of sale. (First Nat. Bank v. Yocom, 438.)

Sales—Conditional Sale Sufficient Consideration for Promise to Pay Price.

12. Conditional sale contract, giving possession and use of goods to buyer while title remains in seller until full payment, affords sufficient consideration for buyer's absolute promise to pay price. (First Nat. Bank v. Yocom, 438.)

SALT-WATER CRABS.**Prohibiting Taking, Class Legislation, and Void.**

See Constitutional Law, 2-6.

See Statutes, 1.

When Statute is Valid.

See Fish, 1-4.

SCHOOLS AND SCHOOL DISTRICTS.**Schools and School Districts—Employment of Teacher must be in Writing.**

1. Under Laws of 1913, page 301, Section 1, subdivision 7, authorizing school directors to contract with teachers and requiring them to file such contracts in the office of the district clerk, a contract for the employment of a teacher must be in writing. (Taggart v. School Dist. No. 1, 422.)

Schools and School Districts—Teacher cannot Rely on Apparent Authority of Superintendent to Employ.

2. A school-teacher is presumed to know the law requiring contracts of school directors employing teachers to be in writing, and cannot rely on apparent authority of the superintendent of the district to hire teachers orally. (Taggart v. School Dist. No. 1, 422.)

Schools and School Districts—Teacher not Entitled to Hold Under Tenure of Office Act Unless Employed in Writing.

3. A school-teacher cannot claim the benefit of the Tenure of Office Act (Laws 1913, p. 69), as amended, by Laws of 1917, page 196, applying to certain districts only and fixing the tenure of teachers in the employ of school district, unless the contract was in writing as required in all districts by Laws of 1913, pages 301, 304, Section 1, subdivisions 7, 17. (Taggart v. School District No. 1, 422.)

Schools and School Districts—"Permanent Teachers"—Rights of.

4. In order to give a teacher the rights of a "permanent" teacher under Laws of 1917, page 196, the appointment under which she has been teaching must be, not only valid, but "regular." (Taggart v. School Dist. No. 1, 422.)

Schools and School Districts—One Appointed Substitute not "Regularly" Appointed nor a "Permanent Teacher."

5. One appointed by superintendent of schools as a substitute only to take the place of a regular teacher temporarily, until the regular teacher should recover from her illness or until death should end her employment, was not "regularly" appointed, within the meaning of Laws of 1917, page 197, Sections 4, 5, relating to the rights of permanent teachers. (Taggart v. School Dist. No. 1, 422.)

Schools and School Districts—Substitute Teacher—Termination of Employment—Notice not Necessary.

6. Laws of 1913, page 69, Chapter 37, Section 2 (if still in force), and Laws of 1917, page 197, Section 3, the former relating to classification of teachers and the latter to notice of termination of employment, have no application to substitute teachers temporarily employed. (Taggart v. School Dist. No. 1, 422.)

Schools and School Districts—Appointment of Teacher by Superintendent not "Regularly" Appointed.

7. Laws of 1913, page 301, Section 1, subdivision 7, providing that board shall hire teachers and make contracts, is not inconsistent with Laws of 1917, page 196, and a teacher appointed

by the superintendent of a district was not "regularly" appointed, within the meaning of Sections 4 and 5 of the latter act, relating to the listing and rights of permanent teachers; the word "regular," meaning in accordance with the prescribed authority, or, in the absence of prescribed authority, that it is according to the proper and appropriate method of procedure. (Taggart v. School Dist. No. 1, 422.)

Schools and School Districts—Teacher—Irregular Appointment—Ratification Did not Render Teacher "Regularly" Appointed.

8. The fact that the school board, having authority under Laws of 1913, page 301, Section 1, subdivision 7, to make contracts with teachers, accepted the services of a teacher irregularly appointed by the superintendent of the school district, did not render her a "regularly" appointed teacher, within the meaning of Laws of 1917, page 197, Sections 4, 5, relating to the listing and rights of permanent teachers. (Taggart v. School Dist. No. 1, 422.)

SELF-DEFENSE.

Instructions on Self-defense.

See Homicide, 8.

SEWER.

Instrument not Recorded not Binding on Purchaser Without Notice.

See Easements, 1.

SEWER DISTRICT.

See Municipal Corporations, 5-9.

SPECIAL APPEARANCE.

Reserving Right to Object to Jurisdiction is a General Appearance.

See Appearance, 1.

SPECIAL FINDING.

See Trial, 7.

SPECIFIC PERFORMANCE.

Specific Performance—Either Party to Contract for Purchase Entitled to Remedy.

1. Either party to a contract for the purchase of real property may maintain a suit for specific performance; the vendee to recover the land, and the vendor to recover the purchase price. (Slattery v. Gross, 554.)

Specific Performance—One of Three Joint Purchasers Entitled to Remedy Against Joint Purchasers.

2. Where one of three vendees who have contracted to purchase property at certain price, and have agreed among themselves that each is to pay one third and receive a one-third undivided interest, has fulfilled his contract and paid his part of the purchase price, and is about to lose his interest in the land by reason of the failure of the other vendees to perform, he may maintain specific per-

formance against them to compel them to carry out their contract, and thereby secure to himself the land to which he is entitled. (Slattery v. Gross, 554.)

Specific Performance—Contract of Purchase—Option—Forfeiture—Vendee's Default.

3. A provision in a contract for the sale of land that on 60 days' default the contract should be void and payments thereon forfeited, or that the vendor might elect to declare the whole of the purchase price due and proceed at once by foreclosure or otherwise, *held* to give the vendor an option, after the 60-day period, even though he did not at once, to elect to proceed with the contract and enforce performance thereof. (Slattery v. Gross, 554.)

STATES.

States—Money cannot be Expended Without Appropriation Therefor.

1. The authority to make an appropriation of state moneys is vested exclusively in the legislature, and no commission or individual has any power whatever to expend the public moneys without a legislative appropriation therefor, in view of Article IX, Section 4, of the Constitution. (Holmes v. Olcott, 33.)

States—Appropriation of Public Moneys Held Sufficiently Definite and Certain.

2. The moneys and license fees appropriated by Laws of 1915, Chapter 287, and Laws of 1915, Chapter 257, Section 3, as amended by Laws of 1917, Chapter 243, Section 1, for the protection and propagation of game within the state, although no sum is specified, become definite and certain when the moneys are collected and turned in to the state treasurer, all of such sums paid in to be used for the purpose specified, and the appropriation of such moneys is sufficiently definite as to amount. (Holmes v. Olcott, 33.)

States—Statute a Continuing "Appropriation" of Moneys and License Fees for Protection of Game.

3. Laws of 1915, Chapter 257, Section 3, as amended by Laws of 1917, Chapter 243, Section 1, providing that moneys and license fees paid into the state treasury shall be considered as an appropriation, etc., is in the nature of a continuing "appropriation" of the amounts paid in, under Laws of 1915, Chapter 287, and is an "appropriation" made by law within the meaning of Article IX, Section 4 of the Constitution. (Holmes v. Olcott, 33.)

STATUTE OF FRAUDS.

Frauds, Statute of—Memorandum of Guaranty not Expressing Consideration Void.

1. A memorandum guaranteeing a printing company against loss for printing done for a named corporation, which does not express the consideration, either by express terms or so as to indicate that the particular consideration, and no other, was that upon which the contract was given, is insufficient, and the contract is void under Section 808, subdivision 2, L. O. L. (Pioneer Show & Com'l Printing Co. v. Zetosh, 194.)

STATUTES.**Statutes—Constitutionality of Law Prohibiting Taking Salt-water Crabs in County Named for Purposes of Sale.**

1. Section 5360, L. O. L., prohibiting the taking of salt-water crabs from Coos County for purpose of sale, as it exists apart from the void amendments of 1915 and 1917, is not such a special or local law as comes within the inhibition of Constitution, Article IV, Section 23, which inhibits the enactment of special or local laws "for the punishment of crimes and misdemeanors," since the provision for punishment as a misdemeanor for violation is merely incident to the act. (State v. Savage, 53.)

Statutes—Void Amendment Leaves Statute Unchanged.

2. Where amendments to section of the statute are void, the section itself remains intact and valid. (State v. Savage, 53.)

Statutes—Title of Act Regulating Fishing Held to Embrace Subject of Justice Court's Jurisdiction Over Prosecutions.

3. Laws of 1915, page 226, which, with Section 5257, L. O. L., as amended by Laws of 1915, page 60, and Section 5283, prescribe comprehensive regulations for fishing, and for punishment for violations, is not invalid, under Article IV, Section 20, of the Constitution, declaring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, because Section 23 declares that, unless otherwise specifically provided, Justices' Courts shall have concurrent jurisdiction in the first instance with the Circuit Court of all offenses; that provision being connected with the subject matter of the act. (State v. Blanchard, 79.)

Statutes—Statute Fixing Different Regulations for Fishing in Different Counties not "Local Law."

4. Though Laws of 1915, page 60, amending Section 5257, L. O. L., provides different regulations for fishing in different counties of the state, it is not invalid, under Article IV, Section 23 of the Constitution, declaring that the legislature shall not pass special or local laws for punishment of crimes, for, though violation of regulations applicable to particular streams is made an offense, the act is not a "local law," which, properly speaking, is one whose operation is confined within territorial limits other than those of the whole state, or any properly constituted class of localities, while these special regulations as to particular streams apply to all of the people of the state alike. (State v. Blanchard, 79.)

Statutes—All Legislation on Same Subject must be Given Effect.

5. All legislation on the same subject must be taken *in pari materia* and all given effect where possible. (Taggart v. School Dist. No. 1, 422.)

Statutes—Irrigation Act of Another State—Notice for Election—Preclude Adoption of Construction.

6. Where the irrigation district act of another state authorized an election for the issuance of district bonds in the amount determined, while the Oregon statute requires an election for the issu-

ance of bonds for any purpose, the legislature cannot be held to have adopted a construction previously placed on the act of the other state as not requiring the purpose of the bonds to be stated in the call for election. (Medford Irr. Dist. v. Hill, 649.)

See Costs, 1.

See Highways, 1.

See Schools and School Districts, 1-8.

See Taxation, 8.

See Trial, 9.

Validity of not Determined Unless Necessary to Decision.

See Constitutional Law, 7.

Authorizing Service Through Corporation Commissioner.

See Corporations, 4.

Makes County Liable for Death from Defective Highway Bridge.

See Death, 1.

Indorsement of Statute Supposedly Violated.

See Indictment, 1.

Restraining Officers Enforcing Void Statute.

See Injunction, 1.

Petition for Appointment of Guardian Need Only Follow Statute.

See Insane Persons, 1.

Requiring License to Practice Dentistry.

See Physicians and Surgeons, 1-3.

STATUTES OF OREGON.

See Table in Front of This Volume.

STATUTES OF THE UNITED STATES.

See Table in Front of This Volume.

STIPULATION.

Stipulations—As to Ownership of Lot Controls Allegations in Pleading.

1. Where a judgment was based on both pleadings and stipulation that the plaintiffs owned a certain lot, plaintiffs' ownership must be assumed, regardless of allegations or denials in the pleadings. (Chevchuk v. Kotchik, 181.)

Reply Alleging Waiver in Contract Sued on a Departure.

See Pleading, 2.

STOCK.

See Corporations, 3.

STOCKHOLDERS.

Liability on Express or Implied Promise.

See Corporations, 1.

Reduction of Capital Stock Entitles Subscriber to Rescind and Recover Money Paid.

See Corporations, 2.

SUBCONTRACTOR.

See Highways, 1-3.

See Municipal Corporations, 1-4.

SUMMONS.

Motion to Quash not Answer on Merits Amounting to General Appearance.

See Appearance, 2.

Service of Summons in One State Does not Give Courts of Other States Jurisdiction.

See Process, 1.

TAXATION.

Taxation—Power is Limited to Persons, Property and Business Within Territorial Jurisdiction.

1. The power of taxation though an inherent attribute of sovereignty is limited to the taxation of persons, property and business situated within the territorial jurisdiction of the state imposing the tax. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation—Personal Property—Follows Owner is Subject to Exception.

2. The general rule that personalty follows the owner is invoked to determine the situs of personal property for taxation as a fiction to work out justice, and is not permitted to govern when justice does not demand that it should, and cannot prevail when inconsistent with express provisions of the statute. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation—"Personal Property"—Tangibles and Intangibles.

3. Personal property for purposes of taxation includes intangibles as well as tangibles, so that not only money but promissory notes and accounts are subject to taxation. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation — Tangible Personalty — Nonresident Owner — Taxable Where Located.

4. Tangible personal property may be taxed where it is physically located, even though the owner resides in another jurisdiction. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation—Bills and Notes—At Owner's Domicile in Another State not Taxable.

5. Promissory notes owned by a resident of another state and held by him at his place of residence are not taxable within the state, though executed by state residents, though the paper on which the note was written is considered the note, so that it may be treated as tangible property. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation—Bills and Notes—Owner—"Business Situs" of Nonresident Within State may be Taxed.

6. Where a nonresident has acquired a business situs within the state, that is, has carried on a business in the state more or less permanent in its nature, the property used in that business, including notes and accounts arising from such business transactions, becomes localized at the place where the business is conducted, and is there taxable. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation—Nonresident Manufacturer, Represented in State Only by Salesman, has no Business Situs.

7. A nonresident manufacturer, whose only agent in the state is a salesman authorized only to take orders, which are filled directly from the factory, and for which payment is made to the manufacturer out of the state, has no business situs within the state, so as to render accounts and notes for sales within the state taxable. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation—Bills and Notes of Nonresident not Taxable as "Personal Property"—Statutes.

8. Section 3551, L. O. L., as amended by Laws of 1907, Chapter 268, making taxable personal property situated or owned within the state, and section 3553, as amended by the same chapter, defining personal property to include debts due from solvent debtors, when construed in the light of their legislative history, do not make taxable notes and accounts due from resident debtors to a nonresident of the state, who has no business situs within the state. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Taxation—Domicile of Owner—Prima Facie Situs of Personalty for Taxation.

9. The domicile of the owner is *prima facie* the situs of personal property for taxation, so that unequivocal words are ordinarily needed in any tax legislation to separate the personal property from the owner's domicile. (Endicott, Johnson & Co. v. Multnomah County, 679.)

Mandamus may Issue to Compel Acceptance of Tax.

See Mandamus, 1.

TEACHER.

Employment of Teacher must be in Writing.

See Schools and School Districts, 1-8.

TENDER.

Sheriff cannot Prevent Contest of Road Tax by Refusing to Accept Other Taxes Tendered, Without Road Tax.
See Mandamus, 1.

TENURE OF OFFICE ACT.

See Schools and School Districts, 1-8.

TESTAMENTARY TRUST.

See Trusts, 1, 2.

THREATS.

Admissible in Evidence Though not Directed Especially to Deceased.
See Homicide, 1.

Instruction on Threats not Abstract.
See Homicide, 7.

TIME.

See Appeal and Error, 1.
See Evidence, 12.

TITLE.

Possession for Ten Years Gives Fee-simple Title.
See Adverse Possession, 2.

TITLE OF ACT.

Every Act shall Embrace but One Subject Which shall be Expressed in the Title.
See Statutes, 3.

TRANSCRIPT.

Effect of Transcript not Filed Within Thirty Days.
See Appeal and Error, 21.

Of Evidence must be Certified by Trial Judge.
See Exceptions, Bill of, 1.

TRESPASS.

See Animals, 1, 2.
See Damages, 5.
See Waters, 11.

TRIAL.

Trial—Instruction as to Signing of Contract Held not Erroneous in View of Rest of Instruction.

1. In action for failure to deliver potatoes sold by defendant's minor son, an instruction that it was for the jury to determine whether contract was signed by both parties at the time it was entered into is not erroneous in that it required both parties to

sign at the same time in view of other part of instruction, "and this becomes one of the material questions for you to determine in the course of settlement of the issues herein presented." (Hurst v. Hill, 311.)

Trial—Requested Instruction not Based on Evidence Properly Refused.

2. A requested instruction that, if one when injured was traveling on the left side of the street, he was traveling unlawfully, is properly refused; there being no testimony on which to base it. (Coates v. Marion County, 334.)

Trial—Refusal of Instructions Covered by Those Given Proper.

3. It is not error to refuse requested instructions which are fully covered by instructions given. (Coates v. Marion County, 334.)

Trial—Differences in Inferences from Evidence for Jury; Motion for Nonsuit Admits Truth of Evidence; "Demurrer to Evidence."

4. A motion to nonsuit is a "demurrer to the evidence" and admits the truth of the evidence and every reasonable inference of fact which the jury may infer from it, and, if different conclusions can be drawn from the facts, the case should be left with the jury. (Herrick v. Barzee, 357.)

Trial—Submission of Special Issues is Discretionary.

5. Whether particular questions of fact shall be submitted to the jury for their finding in addition to the general verdict is within the discretion of the trial court. (Horn v. Elgin Warehouse Co., 403.)

Trial—Submission of Special Issues Held not Abuse of Discretion.

6. In an action for breach of warranty of wheat sold for seed, where defendant pleaded a sale as agent for a disclosed principal, it was not an abuse of the trial court's discretion to submit special questions whether the sale was made as agent and whether the agency was disclosed to plaintiff. (Horn v. Elgin Warehouse Co., 403.)

Trial—General Verdict Controls Unless Special Finding is Inconsistent.

7. Under Section 155, L. O. L., providing that a special finding inconsistent with the general verdict shall control, the general verdict must prevail unless the special finding is inconsistent. (Horn v. Elgin Warehouse Co., 403.)

Trial—Damages—Exemplary Damages—Instructions.

8. An instruction, "there is only one kind of damages which you may find in this case, that is compensatory damages; no exemplary damages are asked, and therefore you may only allow compensatory damages, if any at all"—was not erroneous as implying that, if exemplary damages had been asked by plaintiff, it would have been the duty of the jury to allow them. (Brown v. McCloud, 549.)

Trial—Action at Law—Answer—Equitable Relief—Statutes.

9. Under section 390, L. O. L., as amended by Gen. Laws of 1917, page 126, defendant in an action at law setting up in his answer facts entitling him to relief in equity and material to his

defense, the case is properly proceeded with as a suit in equity till determination of the issues thus raised. (James v. Ward, 667.)

See Appeal and Error, 24.

TROVER AND CONVERSION.

Technical Manner of Pleading Ownership not Open on Motion for New Trial.

See New Trial, 1.

TRUSTEE.

See Charities, 4-6.

TRUSTS.

Trusts—Oral Agreement to Hold Land Subject to Conveyance When Directed Held Void.

1. Where land was conveyed in trust for a woman under an agreement that the trustee should convey to her or as directed by her, and she orally directed the trustee to convey to her daughters, the power thereby given the trustee was void under the statute of frauds (Sections 804, 7398, L. O. L.), as the trust was for her benefit, and no trust could be created by parol for the benefit of the daughters. (Chance v. Weston, 390.)

Trusts—When Testamentary in Character, Could not be Executed After Death of Donor.

2. Where a woman for whose benefit land was conveyed in trust, under an agreement that the trustee should convey to her or as directed by her, directed the trustee to convey to her daughters, and the attempted trust in favor of the daughters was testamentary in character, it could not be executed after her death, and the trustee's conveyance pursuant to such direction after her death was void. (Chance v. Weston, 390.)

Trusts—"Express Trusts" and "Implied Trusts" Defined.

3. "Express trusts" are such as are created by the deliberate or intentional act of the settlor, and "implied trusts" are trusts which without such voluntary acts arise out of the transactions of the parties by operation of law. (Howard v. Foskett, 446.)

Trusts—Complaint Seeking to Establish Trust Held Founded on Express Trust.

4. A complaint, alleging that land was conveyed by a husband to a third person and by the third person to the husband and wife as tenants by the entirety, and that in consideration of the execution of such deeds the wife verbally promised the husband that if she survived him she would convey the land to his children by a former marriage, reserving a life estate to herself and seeking to establish a trust in the land, was founded upon an express trust alleged to have been created by parol agreement. (Howard v. Foskett, 446.)

Trusts—Express Trust in Land cannot be Proved by Parol Evidence.

5. Under Section 804, L. O. L., providing that no estate or interest in real property other than a lease for not exceeding one

year nor any trust or power concerning such property can be created, transferred, or declared otherwise than by operation of law or by writing, parol evidence is inadmissible to establish an express trust in land. (Howard v. Foskett, 446.)

Trusts—Trust Held not Sufficiently Declared by Letter.

6. Where it was claimed that a wife in consideration of the conveyance of land to herself and her husband as tenants by the entirety agreed in case she survived the husband to convey it to his children reserving a life estate, a letter written the husband of one of the children, stating that she was not in a position to know "what arrangement could be made protecting my life interest in the properties as well as my personal equity therein," and that she must have the advice of counsel and would then communicate with him, was not a sufficient declaration of trust. (Howard v. Foskett, 446.)

Husband not Barred of Curtesy by Conveyance in Trust for Wife.

See Curtesy, 1-4.

UMPIRE.

See Arbitration and Award, 1-5.

UNITED STATES STATUTES.

Cited and Construed in This Volume.

See Table in Front of This Volume.

VARIANCE.

See Master and Servant, 3.

VENDOR AND PURCHASER.

Vendor and Purchaser—No Vendor's Lien on Conveyance in Consideration of Future Support of a Third Person.

1. Where a conveyance of land is made in consideration of future support of a third person, no vendor's lien arises. (Murphy v. Whetstone, 293.)

Vendor and Purchaser—Joint Purchasers—Presumption.

2. The fair presumption is, in the absence of contrary evidence, that, where three parties agree to purchase real property at a given price, each one is to take an undivided one third in the real property and to pay one-third of the price. (Slattery v. Gross, 554.)

Vendor and Purchaser—Contract—Rescission—Evidence.

3. Evidence in suit between parties to contract for sale of land held not to show agreement that it should be rescinded if title was not perfected by a certain date. (James v. Ward, 667.)

Vendor and Purchaser—Contract—Rescission—Fraud.

4. A purchaser by treating the contract in force and continuing in possession of the premises enjoying the benefits after knowledge

of fraudulent representations waives right to rescind on account thereof. (James v. Ward, 667.)

Vendor and Purchaser—Taking Possession by Vendor—Abandonment—Mutual Rescission.

5. The taking possession by vendor of the premises when abandoned by the purchaser does not constitute a mutual rescission of the contract of sale; this being done that a third person, against whom he was prosecuting a suit to quiet title, should not gain an advantage by entering into possession and to protect the buildings. (James v. Ward, 667.)

Vendor and Purchaser—Foreclosure of Contract—Attorney's Fees—Amount Due.

6. Attorney's fees decreed in suit to foreclose contract of sale of land should be estimated, not on the full balance of unpaid price, but only on the amount found due, by payment of which, with such attorney's fee, it was decreed the purchaser might reinstate the contract. (James v. Ward, 667.)

Default of Vendee on Contract of Purchase.

See Specific Performance, 3.

VENDOR'S LIEN.

No Vendor's Lien on Conveyance in Consideration of Future Support of a Third Person.

See Vendor and Purchaser, 1.

VERDICT.

See Appeal and Error, 19, 23.

Verdict not Reviewed on Conflicting Evidence.

See Appeal and Error, 10, 14.

As to Damages in Ejectment Suit Held Conclusive.

See Appeal and Error, 13.

Verdict for Plaintiff must be Directed When Ownership in Fee Simple is Admitted.

See Ejectment, 1.

Imperfect Statement of Complaint Cured by Verdict in Absence of Demurrer.

See Pleading, 1.

General Verdict Controls Unless Special Finding is Inconsistent.

See Sales, 9.

See Trial, 7.

VESTED RIGHTS.

See Waters, 1.

WAIVER.

See Contracts, 11.

WARRANTY.**Action for Breach of Warranty of Seed Wheat.**

- See Evidence, 7, 8.
- See Sales, 5-9.
- See Trial, 6.
- See Witnesses, 1.

WATER DISTRICTS.**Farmers' Domestic Water District.**

- See Waters, 3.

WATER-MASTER.

- See Waters, 4, 6.

WATER RIGHTS.

- See Judgment, 1.
- See Waters, 4-7.

WATERS.**Waters—Diversion for Less Than Ten Years—No Vested Right.**

1. Where a father made a parol gift of land to his daughter, and, after her adverse possession had ripened into a fee-simple title, the father went on the land and laid a pipe-line diverting water to other premises, the diversion not having continued for ten years, and the consent of the daughter not having been obtained, it did not amount to a vested right in the father. (Miller v. Conley, 413.)

Waters—Pleading—Insufficient to Confer Right—Quiet Title.

2. In a daughter's suit to quiet title against her father, who made a parol gift of the land to her, and against her brother, claiming right to control waters flowing in a ditch, answer of the brother, stating merely that he had the right to use the waters of the ditch for irrigating his lands, *held* insufficient to confer on him any right to the water. (Miller v. Conley, 413.)

Waters—Farmers' Domestic Water District—Election of Officers—Ballot Title.

3. Under Laws of 1917, page 721, Section 3, relating to the organization and election of commissioners of a water district, prescribing as a ballot title "Shall that portion of _____ county, * * be incorporated as a municipal corporation for the purpose of obtaining water for domestic use for its inhabitants and to be known as," followed by the proposed name, and providing that the affirmative should be numbered 300 and the negative 301, a ballot entitled "For Incorporation of Farmers' Domestic Water District," vote "Yes" or "No," was not such a departure or irregularity as to invalidate an election, as its form could not be misleading. (State ex rel. v. Parkey, 499.)

Waters—Water-master—Parties—Adjudication of Water Rights.

4. Where, under the present status of adjudication of certain water rights, the only dispute that can arise concerns the administration of a prior decree regulating priorities, the Supreme Court, plaintiff having voluntarily dismissed the suit as to the water-

master, the official in charge of administration of the prior decree, can do nothing which would affect him. (Nault v. Palmer, 538.)

Waters—Right to Use—Cannot Benefit Junior User—Injury to Intermediate User.

5. One having priority in the use of water is entitled to use it so that its highest duty will be effected, and can employ it to the best advantage of the tract to which it is appurtenant, but cannot postpone the use of water at its best on such tract in favor of a separate parcel junior to another which is junior to the first, and, having used it on the tract junior to all, take it up and give a belated use on the first tract to the injury of the intermediate user. (Nault v. Palmer, 538.)

Waters—Water-master—Priorities and Privileges must be Preserved.

6. It is the duty of a water-master, under Sections 6617, 6618, L. O. L., to preserve the priorities and the quantities of irrigation water consistently with the highest duty of water as applied to all concerned. (Nault v. Palmer, 538.)

Waters—Courts—Authority—Rule of Evidence—Penalties.

7. The Circuit Court, in Suit concerning water rights and priorities in certain streams, was without authority to establish an arbitrary rule of evidence or to prescribe penalties for future violations of priorities by declaring a voluntary diversion to a tract to which the water was not appurtenant would be conclusive evidence it was not needed by a prior appropriator for fifteen days. (Nault v. Palmer, 538.)

Waters—Appropriation Requires Beneficial Use as Well as Diversion.

8. There can be no valid appropriation of water unless the water is subject to appropriation, and is not only diverted, but also applied to useful purpose, and no appropriation is valid in excess of what is reasonably necessary for the useful purpose in view. (Allen v. Magill, 610.)

Waters—Complaint Stating That Plaintiff Appropriated Water of Stream for Irrigation Held Sufficient.

9. A complaint alleging that plaintiff had appropriated all the water of a stream which flowed a specified number of miner's inches during the irrigating season for irrigation of his tract of land, specifically described in the complaint, for which purpose the amount of water was insufficient, sufficiently alleges the appropriation of the water, which is an ultimate fact. (Allen v. Magill, 610.)

Waters—Federal Desert Land Act Made Water Subject to Appropriation Apart from Land.

10. The Desert Land Act of March 3, 1877 (U. S. Comp. Stats., Sections 4674-4678), separated the land belonging to the United States from the waters flowing thereon, so that anyone who thereafter first appropriated it to beneficial use took it independent of the rights of a subsequent settler on the land. (Allen v. Magill, 610.)

Waters—Diversion by Trespass Gives No Rights Until Perfected by Adverse Possession.

11. The right to divert water for beneficial use on the land of another does not give the right to enter the other land for that purpose, and a diversion made by trespass on the land of another will not be protected in equity unless possession has been continued adversely long enough to give title by prescription. (Allen v. Magill, 610.)

Waters—Evidence Held to Show Appropriation to Beneficial Use.

12. Evidence showing that for more than twenty years continuously plaintiff had diverted and applied to his land described in the complaint the water from a stream *held* sufficient to establish his appropriation and entitle him to an injunction notwithstanding differences in the testimony of the different witnesses. (Allen v. Magill, 610.)

Waters—Irrigation District—Organization—Proceedings for Confirmation.

13. In proceedings for the confirmation of the organization of an irrigation district and the issuance of its bonds, which are in the nature of proceedings *in rem*, the Supreme Court on appeal from a decree of confirmation must examine every question presented by the record, whether discussed in the briefs or not. (Medford Irr. Dist. v. Hill, 649.)

Waters—Irrigation District—Confirm Organization—Nonappearing Parties—Notice.

14. In proceedings to confirm the organization of an irrigation district and the issuance of its bonds, neither the Circuit Court nor the Supreme Court have jurisdiction to enter a decree binding on land owners who did not appear, where the hearing was held before the expiration of ten days after the last publication of the notice, contrary to Laws of 1917, page 773, Section 41, subdivisions a, d. (Medford Irr. Dist. v. Hill, 649.)

Waters—Irrigation District—Confirmation—Appearance—Jurisdiction of Court.

15. Though the statutory notice for proceedings for the confirmation of an irrigation district and the issuance of its bonds was not given, the court can determine the legality of the district and the bonds as against the objections of a land owner who appeared and answered. (Medford Irr. Dist. v. Hill, 649.)

Waters—Irrigation District Bond Election—Duty of Board of Directors.

16. Under Acts of 1917, page 754, Section 19, authorizing election for the issuance of irrigation district bonds for any purpose, the board of directors, in calling the election for a bond issue, must specify in a general way the purpose for which the bonds are to be sold, and cannot, after the election, abandon the purpose stated entirely and sell the bonds to finance a totally different plan. (Medford Irr. Dist. v. Hill, 649.)

Waters—Irrigation District Bond Election—Notice—Necessity for Stating Purpose.

17. The change from the Irrigation District Act of 1911 requiring submission at election of the question whether the bonds required for the project previously determined shall be issued to that of Acts of 1917, page 754, Section 19, requiring an election for issuance of bonds for any purpose, does not indicate an intention to abolish the necessity of stating the purpose of the bonds in the call for the election. (Medford Irr. Dist. v. Hill, 649.)

Waters—Irrigation District Bonds—For What Purpose to be Used—Notice to State General Plan.

18. In stating the purpose for which irrigation district bonds are to be issued, it is not necessary to state more than a general plan, and such plan may be modified or changed in particulars after the bonds are authorized, but cannot be completely abandoned and another plan adopted. (Medford Irr. Dist. v. Hill, 649.)

Waters—Irrigation District—Insufficient Resolution—Bonds—Invalid Election.

19. Where the resolution of the board of directors of an irrigation district adopted a particular project in one paragraph, and in the next paragraph called an election to authorize a bond issue, the sale of bonds authorized at that election to construct a totally different project from that adopted is invalid, whether the resolution be construed as calling the election to issue bonds for that project or as not stating the purpose of the bond as required by statute. (Medford Irr. Dist. v. Hill, 649.)

Waters—Irrigation Districts—Lands may be Eliminated—Statutory Procedure.

20. Lands can be eliminated from an irrigation district after its organization over the objection of other land owners in the district only by strictly following the statutory procedure therefor, including the publication of notice; a stipulation between the district and the owners of the land to be eliminated cannot authorize the elimination of the land as against those not parties thereto. (Medford Irr. Dist. v. Hill, 649.)

See Judgment, 1.

WILLS.**Wills—Testator's Intent Derived from Instrument Controls.**

1. The rule that the controlling factor in the construction of a will is the determination of the intent of the testator from the instrument is codified in Section 7347, L. O. L. (Bilyeu v. Crouch, 66.)

Wills—Limitation Over on Death Means Death Before Death of Testator.

2. Where an absolute estate is devised to be defeated by devisee's death and nothing else is declared as a condition, the estate

will become absolute unless the devisee dies before the testator. (Bilyeu v. Crouch, 66.)

Wills—Death of Beneficiary Held to Defeat Estate Which Passed to Others.

3. Where a woman devised lands to her two sons and their male heirs, with the provision that if either should die without male heirs the land should pass to their female heirs and in case of death without issue should be divided between the testatrix's two daughters, the daughters on death of the one of the devisees without issue became entitled to the property under the executory devise despite Section 7344, L. O. L., declaring that a devise of real property shall be taken as a devise of all the estate and interest of the testator unless it clearly appears that he intended to devise a less estate. (Bilyeu v. Crouch, 66.)

WITNESSES.

Witnesses—In Action for Breach of Warranty of Seed Wheat, Plaintiff can be Asked on Cross-examination, How Much He Paid.

1. In an action for breach of warranty of the variety of seed wheat, where the purchase of any wheat was in issue under the pleadings, plaintiff can be cross-examined as to how much he paid for the wheat in question; since payment of the purchase price is an element of the consummated sale of the wheat. (Horn v. Elgin Warehouse Co., 403.)

Witnesses—Double Mileage—May Demand Fees in Advance.

2. A witness entitled to double fees under Section 818, L. O. L., may demand his fees in advance, but, in order to collect the same, he is not required to do so. (Brown v. McCloud, 549.)

Double Mileage for Witnesses.

See Costs, 1.

Approximate Estimates.

See Damages, 6.

WORDS AND PHRASES.

"Annual income"—See Hartman v. Pendleton, 503.

"Appropriation"—See Holmes v. Olcott, 34.

"Conduct"—See State ex rel. v. State Board of Dental Examiners, 529.

"Detains"—See First Nat. Bank v. Yocom, 438.

"Demurrer to evidence"—See Herrick v. Barzee, 357.

"Drift-net"—See State v. Blanchard, 79.

"Estate in fee"—See Chance v. Weston, 390.

"Express trusts"—See Howard v. Foskett, 446.

"Fee"—See Chance v. Weston, 390.

"F. O. B. cars"—See McDonald v. Supple, 486.

"General appearance"—See Beedle v. Stondall & Timber Co., 590.

"Implied trusts"—See Howard v. Foskett, 446.

- "Labor and Materials"—See *Clatsop County v. Fidelity & Deposit Co. of Maryland*, 2.
- "Local law"—See *State v. Blanchard*, 79.
- "Material"—See *Portland v. New England Casualty Co.*, 48.
- "*Pari materia*"—See *Coates v. Marion County*, 334.
- "Permanent teachers"—See *Taggart v. School Dist. No. 1*, 422.
- "Personal indignities"—See *Steele v. Steele*, 630.
- "Personal property"—See *Endicott, Johnson & Co. v. Multnomah County*, 679.
- "Practice dentistry"—See *State ex rel. v. State Board of Dental Examiners*, 529.
- "Proceeding against entry"—See *Neis v. Ebbe*, 151.
- "Profits"—See *Martin v. Gauld Co.*, 635.
- "Purchase"—See *W. T. Raleigh Co. v. McCoy*, 474.
- "Regularly appointed"—See *Taggart v. School Dist. No. 1*, 422.
- "Retains"—See *First Nat. Bank v. Yocom*, 438.
- "Set-net"—See *State v. Blanchard*, 79.
- "Stubborn"—See *State v. Butler*, 219.
- "Transfer"—See *W. T. Raleigh Co. v. McCoy*, 474.
- "Umpire"—See *Lesser v. Palley*, 142.

WORK AND LABOR.

Work and Labor—Contract—Additional Compensation—Implied Agreement.

1. Where defendant agreed to pay a fixed sum per ton for constructing steel dredge-hulls out of fabricated steel, and defendant failed to promptly supply the steel, and that supplied did not have numbers, etc., plaintiff, having at defendant's request continued to perform the contract, is entitled to recover additional compensation on the implied contract. (*McDonald v. Supple*, 486.)

Work and Labor—Quantum Meruit—Right to Recover for Extra Work.

2. Where failure to perform his part of the contract, by defendant, who had engaged a contractor for a fixed price per ton to construct steel dredges out of fabricated material, made the labor more burdensome and expensive, the contractor, having continued the contract at defendant's request, could recover on *quantum meruit*. (*McDonald v. Supple*, 486.)

Work and Labor—Contract—Deviations—Additional Compensation.

3. Where defendant's deviations from the contract were most serious, and caused the contractor additional expenditures for labor cost, etc., the fact that the deviations were not numerous will not prevent recovery of additional compensation. (*McDonald v. Supple*, 486.)

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